Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JOSEPH DEMSKIE, Superintendent of
Woodburne Correctional Facility,

Petitioner,

-*v*-

RAFAEL FLORES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Under a unique non-constitutional New York rule of discovery, the prosecution must disclose to the defendant *any* recorded statements in its possession made by a testifying witness that pertain to the subject matter of the witness's testimony. Failure to disclose such material will result in *per se* error requiring that the conviction be reversed and a new trial ordered, notwithstanding the absence of prejudice or even that the substance of the material was conveyed in other discovery. However, in the present case, New York's Court of Appeals found that the purpose behind this discovery rule was served by trial counsel, and that, therefore, counsel was not ineffective. The United States Court of Appeals for the Second Circuit, however, found that trial counsel failed to properly exploit New York's discovery law, and that, therefore, the defendant's constitutional right to the effective assistance of counsel was violated.

1. Should a federal court, in habeas corpus review, recognize a Sixth Amendment claim that counsel has been ineffective, founded on a purported failure to utilize a state discovery rule which does not implicate fundamental fairness or the guilt or innocence of the accused where the state courts have provided a full and fair hearing of the claim?

2. Should a federal circuit court, in habeas corpus review, issue a writ based upon counsel's failure to take advantage of a unique state discovery rule where the state's highest court has decided that the rule was not violated?

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OPINIONS BELOW

The Court of Appeals opinion below is published at 215 F.3d 293 (2d Cir. 2000). The United States District Court order denying the writ of habeas corpus is published at 11 F.Supp.2d 299 (S.D.N.Y. 1998).

JURISDICTION

The date the judgment of the Court of Appeals was entered was June 15, 2000. The Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1), which states that cases in the Court of Appeals may be reviewed by the Supreme Court by a writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Review of a judgment of a United States Court of Appeals decision is sought. The basis for federal jurisdiction in the court of first instance was 28 U.S.C. section 2254. The court's power to grant the writ derives from 28 U.S.C. section 2241.

The State Court Proceedings

Summary of New York's *Rosario* Rule

In 1961, the New York Court of Appeals mandated that the prosecution must provide the defense with any non-confidential written or recorded statements of a prosecution witness. *People v. Rosario*, 9 N.Y.2d 286, 289, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 866 (1961). The Court's ruling has since been codified as part of New York's criminal discovery statutes. N.Y. Crim. Proc. Law § 240.45(1)(a).

Thereafter, following *Rosario*, the Court of Appeals held that a failure to turn over *Rosario* material constitutes *per se* error

requiring that the conviction be reversed and a new trial ordered. *People v. Consolazio*, 40 N.Y.2d 446, 354 N.E.2d 801, 387 N.Y.S.2d 62 (1976), *cert. den.* 433 U.S. 914 (1977). The rule applies to material in the possession of the police even if the prosecution does not actually have the document in question. *People v. Ranghelle*, 69 N.Y.2d 56, 503 N.E.2d 1011, 511 N.Y.S.2d 580 (1986). The rule applies even when the undisclosed material must be regarded as trivial, or substantially the same as disclosed material, or in harmony with the witnesses' testimony. *See, e.g. People v. Young*, 79 N.Y.2d 365 (1992) (rejecting "common sense" limit on rule in particular circumstance).

The State Trial and Sentencing and the Memo Book Disclosure Issue

Trial evidence proved that the respondent anally sodomized Miguel S., once in 1987 and once in 1988. Miguel was six years old at the time of the first incident, and both incidents occurred when Miguel S. visited the respondent's apartment to play with his children. The victim testified that respondent directed the other children to another room, removed Miguel's and his own clothing and anally sodomized Miguel while preventing Miguel from screaming out. After the first incident in September of 1987, respondent threatened to kill Miguel if he told anyone about it. During the second incident, occurring around Christmas 1988, respondent told Miguel that he was his "wife now."

Other details were related by the victim's mother: Miguel's school work suffered, he had nightmares, and suffered from diarrhea and pain during bowel movements. The victim's mother also related that she observed a rash on the victim's buttocks, and that the victim began to refuse to take baths. Finally, Dr. Heidi Cohen, a pediatrician and expert in the examination of sexually abused children, examined Miguel and found that his rectum was scarred, a finding consistent with frequent, recurrent penetration

by a penis. The respondent has never challenged the sufficiency of the trial evidence.

At trial, following the State's direct case, defense counsel informed the court that a memo book belonging to Police Officer Karen Pabon — who did not testify but who had supposedly interviewed Miguel "and or" his mother (both of whom were prosecution witnesses) — had not been disclosed to respondent. The prosecutor stated that he had spoken to Officer Pabon about the memo book, and was attempting to obtain it. Defense counsel did not object when the court decided to go forward with the trial notwithstanding the prosecutor's failure to secure the memo book.

The next day, following summations, the prosecutor informed the court that Officer Pabon was on maternity leave and that other police officers were trying to contact her to find out if she had any relevant information in her memo book. The trial court elected to proceed to charge the jury, noting, "when and if the memo book became available, it will be turned over to counsel and if counsel feels that it's appropriate, he will make whatever motions he deems necessary on behalf of his client even to the extent of setting aside the verdict if need be." The jury found respondent guilty.

The issue did not arise again until sentencing, when the memo book was turned over to the defense. The pertinent entries contained in the memo book, in their entirety, are as follows: "Victim Miguel [S.] was sodomized by neighbor while he went to play their [*sic*] with perps children - Victim notified mother who in turn notified Guidance counselor Hilda Beyares. Mother - Carmen [S.] DOB / /...."

When the defense counsel received the memo book, he stated, "the record should reflect I have read the memo book we've been referring to throughout the history of this case. I've reviewed

them [*sic*], there is absolutely nothing in the memo book that would have made any difference in terms of what I did or did not do, ask or did not ask and that's about it."

The Collateral Review Process in State Court

In a collateral attack on his conviction, made before the original trial court and before the direct appeal, respondent argued that trial counsel had been ineffective for a failure to advance a *Rosario* claim. Respondent included in his post-judgment papers an affidavit from defense counsel who stated that "I was not aware that the failure to turn over the memo book, unless waived, was *per se* reversible error that would have required vacatur of [respondent's] conviction."

The trial court's decision on the motion referred to the "alleged *Rosario* violation" and the "alleged *Rosario* error," and denied the motion. The court found respondent's claim that vacatur was mandated by the (alleged) *Rosario* error to be procedurally barred, and denied the Sixth Amendment claim on the merits, noting that Mr. Katz's performance had been "excellent." The defendant sought leave to appeal this decision and leave was denied.

The Direct Review Process

The gist of respondent's Sixth Amendment argument on direct appeal was that defense counsel did not claim *Rosario* error, thereby sacrificing an "automatic" new trial for respondent. The respondent asserted that the People had committed an "indisputable *Rosario* violation," that the error was *per se* reversible error, that a new trial was available for the asking, and that defense counsel, instead, and for no reason, "jettisoned" the *Rosario* claim by admitting at sentencing that the memo book was useless to the defense. The intermediate appellate court (the Appellate Division) rejected the claim, and affirmed the

conviction. *People v. Flores*, 194 A.D.2d 439, 599 N.Y.S.2d 255 (1st Dept. 1993).

Leave to appeal was granted, and, in a 5-2 vote, New York's highest court, the Court of Appeals, the court which enacted the *per se Rosario* rule, affirmed the Appellate Division decision. *See People v. Flores*, 84 N.Y.2d 184, 639 N.E.2d 19, 615 N.Y.S.2d 662 (1994). The majority began its opinion by noting that there had been no showing that the memo book "even technically qualified as *Rosario* material" (*Id.* at 186), and cautioning that "there can be no certainty at this juncture that a new trial was an available remedy" at the time of sentencing. (*Id.* at 187).

The court thus implicitly rejected respondent's claim that the alleged *Rosario* error was an indisputable *per se* basis for a new trial. Moreover, the court rejected respondent's claim that defense counsel's failure to exploit a *per se Rosario* error constituted ineffective assistance of counsel. Instead, the court asked whether, "the attorney's decision not to press for a new trial at the post-verdict state of the criminal proceeding — assuming without having to decide in this case that a new trial was then procedurally and merit-wise available — based on a possible *Rosario* appellate point of argument" constituted ineffective assistance of counsel. *Id.* at 187. The court answered this question in the negative, finding that Mr. Katz's performance was not ineffective. *Id.*

Reiterating *Rosario*'s pronouncement that "a right sense of justice" required that defense counsels "determine for themselves" whether a document had value for cross-examination, the court concluded that "[d]efense counsel in this case got eventually to do precisely what *Rosario* directed." *Id.* at 187. Defense counsel had asked for the document, received it, examined it, and arrived at a conclusion about its value to the defense. The actions did not "rise to the level of egregious and prejudicial conduct." *Id.* at 187. The court also noted that it

would be pointless to direct a new trial, where respondent would employ Officer Pabon's now-disclosed memo book for no other end than to "pursue a line of inquiry defense counsel evaluated and declared 'absolutely' meaningless and valueless." *Id.* at 189.

The Habeas Corpus Petition

On April 17, 1996, Rafael Flores filed a petition for a Writ of habeas corpus, claiming that he had been denied his federal constitutional right to the effective assistance of counsel when his lawyer, after conviction but prior to sentencing, waived a *per se* reversible trial error.

The Magistrate Court Proceedings

The Magistrate court, applying New York law, assumed that the memo book was *Rosario* material, notwithstanding that the State's highest court was unable to reach the same conclusion. Nevertheless, relying on *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the court found that the prejudice test governing a trial counsel's unreasonable performance is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Because the memo book did not open any new avenues for the defense, it could not be said that the failure to disclose it rendered the proceeding "fundamentally unfair," and therefore there was no violation of the respondent's constitutional rights.

The District Court Proceedings

At the outset of his consideration, District Court Judge Michael B. Mukasey ordered an evidentiary hearing to determine whether the ultimate source of the memo book statements was a witness who testified at trial. Police Officer Karen Pabon testified at the hearing conducted on December 12, 1997. Based

on the testimony, the District Court concluded that the memo book contained *Rosario* material.[1]

Given this, the District Court judged counsel's performance under the *Strickland* test for prejudice — whether there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). The District Court accepted the portion of the Magistrate's Report and Recommendation which found that trial counsel's performance — waiving a preserved *Rosario* claim which would have resulted in a new trial — was "objectively unreasonable." The District Court, however, rejected the magistrate court's distinction between trial and appellate-based ineffective assistance of counsel claims, concluding that "[t]here is no basis in Second Circuit case law for distinguishing between trial and appellate counsel prejudice."

Although the court found that the *Fretwell* test for prejudice — whether counsel's deficient performance rendered the trial or proceeding fundamentally unfair — is limited to situations where the state court misinterprets federal law, it went on to say:

> [E]ven if *Fretwell*'s fairness and reliability inquiry did apply, it would not dictate a different result from the out-come determination test. That *Fretwell* test requires that the Court determine whether the proceeding was unfair, i.e., whether [Flores] was deprived of any substantive or procedural right. . . . A defendant with competent counsel [Flores] argues, would have received a new trial, while [Flores] did not. This, if he is correct, was unfair.

---

[1] Petitioner has disputed this determination as factually incorrect and legally irrelevant given the New York Court of Appeals decision.

Flores v. Demskie, 11 F.Supp.2d 299, 306 (S.D.N.Y. 1998). Thus, the District Court concluded, if the memo book were *Rosario* material, then Mr. Flores would have been prejudiced by his counsel's deficient performance.

The court went on to find, however, that the memo book fell within the "duplicative equivalent" exception to the *Rosario* rule under New York law. The court found that the memo book and the police complaint report, a document disclosed to the respondent before trial, were duplicative equivalents. The court found the one difference with the memo book "utterly unremarkable." Thus, the court concluded that "the undisclosed memo book was the duplicative equivalent of the disclosed police report. Therefore, there is no basis for finding that a new trial would have been granted here, even if Flores' counsel had moved for one."

On May 26, 1998, Judge Mukasey granted both a Certificate of Appealability and leave to proceed *in forma pauperis*.

The Court of Appeals Opinion

The United States Court of Appeals for the Second Circuit analyzed the Sixth Amendment claim, as had the District Court, under the *Strickland* standard. The Circuit Court accepted the District Court's finding that the memo book was *Rosario* material but went on to reject the District Court's duplicative equivalence finding. As a result, the court found that there had been a *Rosario* violation. Given this error, the Circuit Court held that the respondent had suffered prejudice as a result of the fact that his trial counsel's conduct had fallen below an objective standard of reasonableness and that, therefore, the habeas petition should be granted.

REASON FOR GRANTING THE WRIT

The extraordinary remedy of federal habeas corpus should not be routinely available for a claimed Sixth Amendment violation founded on the failure to advance a State law claim. Where the petitioner has had a full and fair opportunity to litigate the issue in state court, and where the underlying state law at issue does not implicate fundamental fairness or the reliability of the state proceeding, equity should foreclose federal review.

In the State courts, petitioner claimed that he was deprived of the effective assistance of counsel by nature of the attorney's decision not to invoke a unique New York discovery rule. New York's Court of Appeals, the court which itself created the *per se Rosario* rule as a matter of State law, considered petitioner's Sixth Amendment claim, and found that counsel's performance was faithful to the law's purpose. The court stated that, while a "'right sense of justice'" required defense counsels' personal examination of prior recorded statements of witnesses to "'determine for themselves'" whether a document may be helpful for cross-examination purposes, "[d]efense counsel in this case got eventually to do precisely what *Rosario* directed." *Flores*, 84 N.Y.2d at 187, 615 N.Y.S.2d at 663 (quoting *Rosario*, 9 N.Y.2d at 289). As the court stated, "*Rosario* was designed to insure that defense counsel, not Judges, should do the strategic viewing, weighing and exercising of the defendant's fair trial advocacy interests in this regard." Thus, New York's appellate courts, which had crafted the rule in the first place, held that the rule's purpose was satisfied.

> When counsel candidly denies having any use for the material . . ., it cannot be said that the defendant has any substantive right to be vindicated, and there is no basis in law or logic to order a new trial when there is no new issue to be tried. There is no basis in the record to controvert counsel's conclusions, and neither

> can counsel's representation be deemed incompetent merely because he did not pursue a concededly frivolous substantive claim as a basis for a new trial."

Flores, 84 N.Y.2d at 189, 615 N.Y.S.2d at 665 (quoting *Flores*, 194 A.D.2d 439, 599 N.Y.S.2d 255).

Nevertheless, the circuit court, reviewing New York's law on an issue which, in the posture presented, had nothing whatsoever to do with the fairness of the proceedings, the guilt or the innocence of the accused, or any federal constitutional provision, chose to order a new trial. The Circuit Court's ruling did not show a proper restraint, but usurped the right of New York courts to have the final say on the scope of New York law. In direct opposition to the New York Court of Appeals, it concluded New York's discovery law was not properly utilized by defense counsel. Therefore, the Circuit Court found that Petitioner's Sixth Amendment right to counsel was violated.

In order to reach its conclusion, the Circuit Court necessarily considered the underlying State law issue. Yet this Court has previously held, in the absence of a Sixth Amendment claim, that "[s]uch an inquiry . . . is no part of a federal court's habeas review of a state conviction." *Estelle v. McGuire*, 502 U.S. 62 (1991). Indeed, it is axiomatic that federal habeas corpus relief is unavailable for errors of state law. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).

In *Stone v. Powell*, 428 U.S. 465, 494 (1976), this Court stated that where a defendant was provided with "an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." This Court should extend the doctrine annunciated in *Stone* to the context of Sixth Amendment claims founded on the

litigation of state law rules that do not implicate federal constitutional rights or the reliability of the state proceedings. That is, where a defendant has been provided with a full and fair opportunity to litigate a Sixth Amendment claim founded on the failure to properly utilize a state law rule, federal courts should be precluded from reconsidering such a claim unless the state rule is one that either implicates a federal constitutional right, or arguably involves some other fundamental fairness issue.

This case presents a rare opportunity to explore the parameters of habeas corpus review and the Sixth Amendment guarantee of the right to counsel. Certainly, it is appropriate to measure a criminal defense attorney's performance for these purposes by, among other things, his or her ability to utilize state law and state procedural guarantees on behalf of the defendant. However, when the issue involves a unique state procedure and the very court which created that procedure holds that under the instant circumstances there has been no violation of it, the granting of the writ offends principles of federalism in several ways. First, it usurps the authority of the State's highest court to determine the meaning of state law. Second, by simply assuming that any failure by counsel to take advantage of any state procedure under any circumstances may form the underlying rationale for granting the writ on the basis of ineffectiveness of counsel, it converts the writ into a mechanism for review of any violation of state law. This "backdoor" approach is completely unwarranted where, as here, the State rule has no constitutional basis and, as applied, does not implicate fundamental fairness or effect the reliability of the proceeding.

> "Habeas corpus ad subjiciendum is today, as it has always been, a fundamental safeguard against unlawful custody. . . . Although the wording of earlier statutory provisions has been changed, the basic question before the court to which the writ is addressed has always been the same: in the language of the present statute,

> on the books since 1867, is the detention complained of 'in violation of the Constitution or laws or treaties of the United States'?"

Fay v. Noia, 372 U.S. 391 (1963) (Harlan, J., dissenting). Here, one thing, if nothing else, is undisputed: *Rosario*'s remedy is grounded in state law. No federal constitutional right is implicated.

It is true that in *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) this Court declined to extend *Stone* to Sixth Amendment claims. The rule proposed here, however, is consistent with both *Stone* and *Kimmelman*. *Kimmelman* is distinguishable because the underlying claim involved a federal constitutional right, not a state-created law like the discovery rule at issue here. Nor can the *Rosario* remedy be characterized as "central to the basic question of guilt or innocence." *Jackson v. Virginia*, 443 U.S. 307 (1979).

As Justice Scalia has stated, habeas jurisdiction should be "tempered by the restraints that accompany the exercise of equitable discretion." *Withrow v. Williams*, 507 U.S. 680, 716 (1993) (Scalia, J., dissenting). "Prior opportunity to litigate an issue should be an important equitable consideration in any habeas case, and should ordinarily preclude the court from reaching the merits of a claim, unless it goes to the fairness of the trial process or to the accuracy of the ultimate result." *Id.* at 720 (Scalia, J. dissenting). In the present case, the respondent here has had every opportunity to pursue both the Sixth Amendment and underlying State claims throughout New York's courts. He raised his claims in a collateral attack before the trial court. He attempted to appeal the denial of this motion and the appeal was denied. The claims were then heard in both the intermediate and highest appellate court of New York. No State court ever ruled in respondent's favor. Indeed, the District also found that

respondent suffered no prejudice. Nevertheless, the Circuit Court chose not to defer to the State court's interpretation of its own rule. Neither finality, nor comity, nor federalism can be said to have been vindicated by this result. *See Brecht v. Abrahamson*, 507 U.S. 619, 635-636 (1993).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 12, 2000

Appendix A - *Flores v. Demski*
215 F.3D 293 (2d Cir. 2000)

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: April 14, 1999 Decided: June 15, 2000)

Docket No. 98-2558

RAFAEL FLORES,

Petitioner-Appellant,

—v.—

JOSEPH DEMSKIE, Superintendent of Woodbourne Correctional Facility,

Respondent-Appellee.

Before:

VAN GRAAFEILAND, JACOBS, and STRAUB,

Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Southern District of New York (Michael B. Mukasey, *Judge*), denying the petitioner-appellant's petition for a writ of habeas corpus. We hold that the petitioner was denied his Sixth Amendment right to effective assistance of

counsel when his state trial counsel, who was unfamiliar with the well-established New York State *Rosario* rule that a failure by the prosecutor to deliver a prior statement of a witness whom the prosecutor intends to call at trial constitutes *per se* error requiring a new trial, waived a violation of this disclosure requirement that would have entitled the petitioner to a new trial.

Reversed and remanded for the conditional granting of the writ.

Judge Van Graafeiland dissents in a separate opinion.

JESSICA S. HENRY, Office of the Appellate Defender, New York, NY (Richard M. Greenberg, of counsel), *for Petitioner-Appellant.*

JOHN F. CARROLL, Assistant District Attorney, Bronx, NY (Robert T. Johnson, District Attorney, Bronx County, Joseph N. Ferdenzi, Assistant District Attorney, of counsel), *for Respondent-Appellee.*

STRAUB, *Circuit Judge*:

Petitioner Rafael Flores, a New York State prisoner, appeals from a judgment entered in the United States District Court for the Southern District of New York (Michael B. Mukasey, *Judge*), denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, Flores argues that he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel, who

admitted after trial that he was unfamiliar with the well-established New York State rule that a prosecutor's failure to deliver a prior statement of a witness to be called at trial constitutes *per se* error requiring a new trial, *see People v. Ranghelle*, 69 N.Y.2d 56, 63, 503 N.E.2d 1011, 1016, 511 N.Y.S.2d 580, 585 (1986), waived a violation of this disclosure requirement that would have entitled the petitioner to a new trial, *see People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 866 (1961). Specifically, according to Flores, the prosecutor failed to provide the defense with a police officer's memo book containing a statement of a witness until after Flores's trial concluded, at which time Flores's trial counsel, unaware of the automatic new trial rule, excused this error by informing the trial judge that he would not have acted differently had he received the memo book prior to trial.

The District Court held an evidentiary hearing, and, in an opinion and order, found that the memo book contained the statement of a witness. However, the District Court also concluded that the statement fell within an exception to the *Rosario* disclosure rule for statements that are the duplicative equivalent of statements already turned over to the defense, and therefore, Flores did not suffer prejudice within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Flores v. Demskie*, 11 F. Supp. 2d 299, 302, 314 (S.D.N.Y. 1998) (citing *People v. Consolazio*, 40 N.Y.2d 446, 454, 354 N.E.2d 801, 387 N.Y.S.2d 62, 66 (1976), *cert. denied*, 433 U.S. 914 (1977)). On appeal, Flores challenges this ruling and argues that the memo book contained *Rosario* material that should have been disclosed and that trial counsel's waiver of this claim for a new trial rendered his performance ineffective. For the reasons that follow, we agree with Flores that he was denied effective assistance of coun-

sel, and therefore, we reverse the District Court and remand for the conditional granting of the writ.

BACKGROUND

On November 9, 1990, Flores was convicted following a jury trial in New York State Supreme Court, Bronx County, of four counts of sodomy in the first degree, in violation of N.Y. Penal Law § 130.50, "arising out of his deviate sexual intercourse with a six-year-old boy who lived in [Flores's] apartment building." *People v. Flores*, 84 N.Y.2d 184, 186, 639 N.E.2d 19, 19, 615 N.Y.S.2d 662, 662 (1994). Flores's trial attorney became aware during jury selection, that the prosecution had failed to turn over the memo book containing notes taken by Officer Karen Pabon, who had interviewed the victim's mother. Because the victim's mother testified for the prosecution during the trial, pursuant to New York's *Rosario* rule, codified at N.Y. Crim. Proc. Law § 240.45(1)(a), the prosecutor was required to produce any written or recorded statement the witness made before the State's opening statement. Should the prosecutor fail to do so, "where a defendant is deprived of *Rosario* material at trial, a new trial is required" in all but a limited set of circumstances. *People v. Banch*, 80 N.Y.2d 610, 615, 608 N.E.2d 1069, 1072, 593 N.Y.S.2d 491, 494 (1992).

Defense counsel informed the trial judge of the prosecutor's failure to produce the memo book at the end of the State's case-in-chief. The court called this mistake "absolutely inexcusable" and told the prosecutor "[y]ou know what the Court of Appeals has said with respect to these memo books." The court went on to complain that:

> Here we are at the end of the trial. Case has been pending for almost two years, and you stand there and tell me you have never given them the memo books, that's out-

> rageous, I tell you the truth. . . . The Court of Appeals has made it clear that we have to give these memo books over to the defense and here we are, the last day, thinking of charging the jury in a case that clearly must be reversed if you don't turn over the memo books.

The judge decided not to charge the jury that day so that the prosecutor could find the memo book. However, the prosecutor was unable to do so. The trial court, recognizing that the memo book "would not be Rosario material, per se" unless it contained the statements of a witness, resolved to charge the jury, allowing defense counsel to "preserve his exceptions for the record with respect to that memo book." If the memo book became available, "if counsel feels that it's appropriate, he will make whatever motions he deems necessary on behalf of his client even to the extent of setting aside the verdict if need be."

After the jury returned its guilty verdict but before sentencing, the prosecution produced the memo book. Immediately prior to sentencing, before the judge had even begun to speak at the hearing, defense counsel informed the court that:

> I have read the memo books we've been referring to throughout the history of this case. I've reviewed them, there is absolutely nothing in the memo book that would have made any difference in terms of what I did or did[ ]not do, ask or did not ask and that's about it.

Counsel then made a motion to set aside the verdict as against the weight of the evidence, which was denied. On November 9, 1990, Flores was sentenced to four concurrent terms of five to fifteen years' imprisonment.

In July 1992, before his direct appeal to the Appellate Division, First Department, was decided, Flores returned to the Supreme Court, Bronx County, and moved to set aside his conviction pursuant to N.Y. Crim. Proc. Law § 440.10.

Flores argued that he was entitled to a new trial because of the alleged *Rosario* violation and because he was denied effective assistance of counsel when his trial attorney waived this issue. In conjunction with the latter argument, Flores submitted an affirmation from his trial counsel, who admitted that he "was not aware that the failure to turn over the memo book, unless waived, was *per se* reversible error that would have required vacatur of Mr. Flores' conviction." Counsel also stated that he "believed that to prevail on a *Rosario* claim [he] would have to show prejudice," and that he failed to discuss with Flores any issues arising from the prosecution's failure to turn over the memo book.

The trial court denied the motion on December 4, 1992. Although the court "acknowledged that it had virtually invited a new trial motion during colloquy about the missing memo book while the trial was ongoing," it stated that it expected an immediate motion pursuant to N.Y. Crim. Proc. Law § 330.30 to set aside the verdict, and not a § 440.10(1) motion two years after the verdict. *Flores*, 11 F. Supp. 2d at 304. The trial court concluded that Flores was procedurally barred from collaterally challenging his conviction because the memo book was part of the trial record. *See* N.Y. Crim. Proc. Law § 440.10(2)(b) (requiring denial of a § 440.10(1) motion where the judgment is on appeal and "sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal"). In the alternative, the court denied Flores's ineffective assistance claim on the merits. The court also expressed its belief that its disposition of the § 440.10 motion would "be incorporated in defendant's direct appeal." On February 4, 1993, a Justice of the Appellate Division, First Department, denied Flores both leave to appeal the disposition of his § 440.10 motion and his request to consolidate that appeal with his direct appeal from his judgment of con-

viction. Not only did this end Flores's collateral attack on his conviction in state court, *see* N.Y. Crim. Proc. Law § 450.15(1), but it also meant that the record created on that motion would not be incorporated into his direct appeal.

After the decision on his § 440.10 motion, Flores perfected his direct appeal—which had been filed in a timely fashion on November 29, 1990—and again raised his claims of a *Rosario* violation and of ineffective assistance of counsel based on the failure to argue the *Rosario* issue. However, apparently as a result of the Appellate Division's order on Flores's appeal of the denial of his § 440.10 motion, neither the § 440.10 motion nor the record created were incorporated into the defendant's direct appeal, *see Flores*, 11 F. Supp. 2d at 304, and trial counsel's affirmation was not presented to the appellate court. On June 17, 1993, the Appellate Division, First Department, affirmed Flores's conviction, rejecting his claim that he received ineffective assistance of counsel without addressing whether there was actually a *Rosario* violation. The First Department concluded that

> Implicit in the rule that a guilty verdict is to be vacated in the event of non-disclosure of *Rosario* material is a requirement that the material might have been of some value to the defense, although the defendant is under no burden to show how. When counsel candidly denies having any use for the material when it is finally disclosed, it cannot be said that the defendant has any substantive right to be vindicated, and there is no basis in law or logic to order a new trial when there is no new issue to be tried. There is no basis in the record to controvert counsel's conclusions, and neither can counsel's representation be deemed incompetent merely because he did not pursue a concededly frivolous substantive claim as a basis for a new trial.

People v. Flores, 194 A.D.2d 439, 439, 599 N.Y.S.2d 255, 256 (1st Dep't 1993) (mem.) (citation omitted).

The New York Court of Appeals then granted leave to appeal and, on July 7, 1994, it affirmed the petitioner's conviction as well. Stating that the "sole dispositive issue" was whether the defendant was "deprived of effective assistance of counsel at the trial level," the Court of Appeals found that "[t]he totality of representation examined as of the time of representation . . . supports [the] elementary conclusion" that the defendant "was not denied his constitutional right to effective assistance of counsel." *Flores*, 84 N.Y.2d at 187, 639 N.E.2d at 20, 615 N.Y.S.2d at 663. Based on trial counsel's statement at sentencing that the memo book would not have changed his actions, the Court concluded that "[d]efense counsel in this case got eventually to do precisely what *Rosario* directed"—determine whether the document had any value for cross-examination. *Id.*, 84 N.Y.2d at 187, 639 N.E.2d at 21, 615 N.Y.S.2d at 664. The Court also speculated that:

> For all this record reveals about defense counsel's ultimate evaluation of the disclosed item, . . . defense counsel could have reasonably considered that his client's interest would best be served by no further delay in the resolution of the case against the client. Any number of other professional strategic reasons or personal considerations affecting the defendant's fair trial interests could also have informed the attorney's professional evaluation and choice on how and why to proceed in the way chosen. The record does emphatically inform us, even as an appellate court reviewing the matter, of the defense lawyer's assessment of the quality and nature of the ultimately disclosed item—"absolutely" useless. A plausible strategy might even have included advocacy for amelioration of sentence or some other nuanced

> advantage in the adversarial exchanges and context, all matters and features not knowable by trial or appellate Judges removed from the full range of choices and context exercised singularly by the trial lawyer for the defendant.

Id., 84 N.Y.2d at 188, 639 N.E.2d at 21, 615 N.Y.S.2d at 664. The Court of Appeals made no mention of trial counsel's ignorance of the *Rosario* rule, suggesting that it was not privy to counsel's post-trial affirmation. Two Judges dissented and indicated that they voted "to reverse and order a new trial, thereby affording defendant the benefit he would have had if his attorney had not inexplicably waived the per se *Rosario* remedy to which he was clearly entitled under this Court's precedents." *Id.*, 84 N.Y.2d at 189-90, 639 N.E.2d at 22, 615 N.Y.S.2d at 665 (Titone, J., dissenting).

Flores filed his petition for a writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254 on April 19, 1996.[1] He argued that he was denied his Sixth Amendment right to effective assistance of counsel based on his trial counsel's failure to move to vacate his conviction as a result of the *Rosario* violation and because counsel volunteered that the alleged *Rosario* material was useless. The District Court referred the petition to Magistrate Judge James C. Francis IV who recommended that it be denied. Applying the two-part test of *Strickland v. Washington*, 466 U.S. at 688, 694, the Magistrate Judge first determined that defense counsel's actions were "objectively unreasonable" because he was not aware of the *per se* nature of the *Rosario* rule and therefore his statement waiving the issue was based on "a complete

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[1] Thus, Flores filed his petition just prior to the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. The modifications to 28 U.S.C. § 2254 promulgated by AEDPA are not retroactively applied to petitions filed prior to the effective date. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

misunderstanding of prevailing law." Report and Recommendation ("Report") at 12. However, the Magistrate Judge concluded that the petitioner had failed to establish that he suffered any prejudice under *Strickland*. In so doing, the Magistrate Judge drew a distinction between the test for prejudice resulting from trial counsel's and appellate counsel's deficient performance. Thus, trial counsel's unreasonable conduct would result in prejudice where the attorney's performance " 'renders the result of the trial unreliable or the proceeding fundamentally unfair.' " *Id.* at 13 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). However, appellate counsel's conduct would result in prejudice only where " 'there was a reasonable probability that [his] claim would have been successful before the [state's highest court].' " Report at 13 (quoting *Mayo v. Henderson*, 13 F.3d 528, 534 (2d Cir.), *cert. denied*, 513 U.S. 820 (1994)). Applying the trial counsel standard, the Magistrate Judge concluded that Flores had failed to show that his counsel's conduct rendered the trial unreliable or unfair.

The District Court reached the same result, but on different grounds. Recognizing that Flores could not have been denied effective assistance of counsel if the memo book in question did not contain *Rosario* material, the District Court held an evidentiary hearing to determine if the memo book contained a statement of the victim's mother. *See Flores*, 11 F. Supp. 2d at 307, 314. Karen Pabon, a former police officer and the author of the memo book entries in question, testified as to her "vague recollection of the events . . . in 1989." *Id.* Specifically, she explained that she had responded to a report of a sexual assault and spoke to the victim's mother. *See id.* The school guidance counselor acted as a translator since the mother spoke only Spanish. *See id.* Lieutenant George Stamp testified for the respondent. Lieutenant Stamp had prepared an "unusual incident" report using information supplied by

Officer Pabon, and, contrary to Pabon's testimony, this report stated that the "[o]fficers were informed by guidance counselor Hilda Be[y]ares" about the crime. The District Court considered the testimony and documentary evidence and concluded that Lieutenant Stamp—and the unusual incident report—were mistaken since Pabon testified that "she did not speak with the victim, and the guidance counsel[ ]or acted only as a translator; by a process of elimination, only the mother could have conveyed the italicized information." *Id.* at 309. Thus, the District Court found that the memo book contained two statements from the victim's mother: (1) Victim[2] "was sodomized by neighbor while he went to play [there] with perps children—victim notified mother"; and (2) "Perp Rafael flores [address] approx 32 M/H." *Id.* at 309.

Although concluding that the memo book contained statements of the victim's mother, the District Court raised *sua sponte* the question of whether the statements in the memo book were merely the duplicative equivalent of those in a report filed by Officer Pabon that had been turned over to Flores's trial counsel. *See id.* (citing *Consolazio*, 40 N.Y.2d at 454, 354 N.E.2d at 801, 387 N.Y.S.2d at 66). If the witness's statements that were not provided to the defense are "nothing more than duplicative equivalents of statements previously turned over to the defense," then the State has no obligation to produce them and the *Rosario* automatic reversal rule does not apply. *Consolazio*, 40 N.Y.2d at 454, 354 N.E.2d at 806, 387 N.Y.S.2d at 66. In explaining this exception to *Rosario*, the District Court noted that " 'omissions often furnish important subjects for cross-examination[,]' . . . but only when the omissions at issue appear in statements by the witness at different times." *Flores*, 11 F. Supp.

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[2] Like the District Court, we have omitted the name of the victim.

2d at 313 (quoting *People v. Young*, 79 N.Y.2d 365, 370, 591 N.E.2d 1163, 1166, 582 N.Y.S.2d 977, 980 (1992)).

After examining Officer Pabon's memo book and police report, the District Court concluded that the two contained statements that were the duplicative equivalent of each other. Since the records were simply different transcriptions of the same statement made by the victim's mother, the District Judge reasoned that unless there was a substantive difference between the statements they would have limited value on cross-examination. The fact that omissions existed could not by itself be a subject for cross, "the witness by hypothesis having spoken only once." *Id.* Here, the court identified two differences, but he did not consider them to be substantive. First, the memo book says that the "victim notified mother," while the report merely suggests that the mother reported the crime. *Id.* Second, whereas the memo book records that the victim "was sodomized by neighbor while he went to play [there] with perps children," the report states that the victim was "playing at neighbors apt." when the assault occurred. *Id.*

Accordingly, the District Court found that since the memo book was the duplicative equivalent of Officer Pabon's report, Flores would not have been entitled to a new trial under *Rosario*. Therefore, Flores suffered no prejudice from his counsel's statement waiving the potential *Rosario* claim. *See id.* at 314. The District Court granted a certificate of appealability, and this appeal followed.

DISCUSSION

On appeal, Flores asserts that the District Court erred in concluding that the statements contained in Officer Pabon's memo book fell within an exception to the *Rosario* disclosure requirement as the duplicative equivalent of those in Officer

Pabon's report. Moreover, because the District Court found that, absent the "duplicative equivalent" exception, the statements in the memo book were otherwise statements of a witness that the prosecution was required to turn over, Flores contends that his counsel's performance was deficient for waiving this *Rosario* claim.

As the District Court did, we analyze Flores's claim of ineffective assistance of counsel under the well-established rubric of *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, the petitioner must establish that (1) his counsel's performance "fell below an objective standard of reasonableness," *id.* at 688, and (2) "there is a 'reasonable probability' that, but for the deficiency, the outcome of the proceeding would have been different," *McKee v. United States*, 167 F.3d 103, 106 (2d Cir. 1999) (quoting *Strickland*, 466 U.S. at 694). Preliminarily, however, we analyze the question considered dispositive by the District Court—whether the memo book contained *Rosario* material that the prosecution was required to turn over to Flores prior to trial.

I. *Applicability of* Rosario *Rule to Memo Book.*

A. *Statements of the Victim's Mother*

In *People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 866 (1961), the New York Court of Appeals held that " 'a right sense of justice' entitles a defendant to inspect the prior statements of a prosecution witness, prior to cross-examination, whether or not his statements vary from his testimony on the stand." *People v. Ranghelle*, 69 N.Y.2d 56, 62, 503 N.E.2d 1011, 1015, 511 N.Y.S.2d 580, 584 (1986) (quoting *Rosario*, 9 N.Y.2d at 289, 173 N.E.2d at 883, 213 N.Y.S.2d at 450). Later, "in order to assure the People's scrupulous adherence to their obligation to turn over *Rosario* material," the Court of Appeals "artic-

ulated a rule of per se reversal" so that "[t]he price for the People's failure to disclose prior statements of their own witnesses thus became automatic reversal of the conviction." *People v. Machado*, 90 N.Y.2d 187, 191, 681 N.E.2d 409, 411, 659 N.Y.S.2d 242, 244 (1997); *accord People v. Banch*, 80 N.Y.2d 610, 615, 608 N.E.2d 1069, 1072, 593 N.Y.S.2d 491, 494 (1992). The Court explained that applying a harmless error analysis "would necessarily require weighing the potential impeachment value of the withheld material," a question best left to the accused's counsel and not to a trial or an appellate court. *Banch*, 80 N.Y.2d at 615, 608 N.E.2d at 1072, 593 N.Y.S.2d at 494. *See* N.Y. Crim. Proc. Law § 240.45(1)(a) (codifying *Rosario* rule).

After holding an evidentiary hearing, the District Court concluded in this case that Officer Pabon's memo book contained the statement of the victim's mother, a witness who testified at trial. We review this factual determination for clear error. *See Polizzi v. United States*, 926 F.2d 1311, 1319 (2d Cir. 1991). The State asserts that the District Court's conclusion was clearly erroneous because Officer Pabon spoke directly with only Hilda Beyares, the guidance counselor who accompanied the victim's mother to meet with the officers. Since Lieutenant Stamp testified that Beyares was the source of Officer Pabon's information, and he in fact wrote this in his "unusual incident" report as well, the State asserts that the memo book contained the statement of Beyares and not the victim's mother.

However, we see no clear error in the District Court's conclusion. Officer Pabon testified that Beyares acted as an interpreter for the mother, and, although Officer Pabon did not speak Spanish and had no direct way of knowing whether Beyares's translation was accurate, the District Court could draw the reasonable inference from Officer Pabon's testimony that only the victim's mother knew the information the

officer was requesting and therefore that Beyares was acting as a translator. Indeed, Officer Pabon stated that she learned the factual background to the crime, such as the description of the alleged perpetrator and the circumstances of the attack, from the victim's mother. The District Court's ruling that the memo book contained the mother's statement is further supported by the police report completed by Officer Pabon, in which she listed the "reporter" of the crime as the victim's mother, and framed the description of the crime as by the "reporter stat[ing] for victim." Finally, although Lieutenant Stamp's testimony and the "unusual incident" report were to the contrary, the District Court could fairly conclude that Lieutenant Stamp was mistaken given the substantial evidence in support of the petitioner's position. In particular, we note that it was Officer Pabon and not Lieutenant Stamp who made the entries in the memo book and who spoke with the victim's mother, and Lieutenant Stamp's testimony at the hearing was based entirely on his review of his report.

B. ***The "Duplicative Equivalent" Exception***

While the District Court concluded that the memo book contained the statements of a witness, the court also found that the memo book fell within an exception to the mandatory disclosure rule because the statements were the duplicative equivalent of other statements contained in the police report completed by Officer Pabon. The District Court based this conclusion on its reading of New York case law explaining this exception, as well as on its belief that the omissions from the police report contained in the memo book would not have been useful on cross-examination. *See Flores*, 11 F. Supp. 2d at 312-14.

Although there is a "strong presumption of the discoverability of prior statements of prosecution witnesses under the *Rosario* rule," the "duplicative equivalent" rule is one

of the "commonsense limits" to such required disclosure. *Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1015, 511 N.Y.S.2d at 584. "Statements are not the 'duplicative equivalent' of previously produced statements, however, just because they are 'harmonious' or 'consistent' with them." *Id.*; *see also People v. Joseph*, 86 N.Y.2d 565, 569, 658 N.E.2d 996, 998, 635 N.Y.S.2d 123, 125 (1995). Thus, according to the New York Court of Appeals, "[a] statement cannot be a 'duplicative equivalent' if it contains *even minor differences* resulting from errors in transcription." *Joseph*, 86 N.Y.2d at 569, 658 N.E.2d at 998, 635 N.Y.S.2d at 125 (emphasis added).

In reaching its conclusion that the witness's statements in the memo book were the duplicative equivalent of those in the police report, the District Court focused on *People v. Consolazio*, 40 N.Y.2d 446, 454, 354 N.E.2d 801, 806, 387 N.Y.S.2d 62, 66 (1976), *cert. denied*, 433 U.S. 914 (1977), the case in which the Court of Appeals first set forth the exception to *Rosario* for duplicative equivalents. In *Consolazio*, certain witness statements, in the form of questionnaires completed by an interviewing officer prior to trial, were not turned over to the defense. *See id.*, 40 N.Y.2d at 452, 354 N.E.2d at 804, 387 N.Y.S.2d at 64-65. However, the prosecution had produced the actual grand jury testimony of the witnesses, and the "statements contained in the worksheets were the same as the statements made by such witnesses before the Grand Jury." *Id.*, 40 N.Y.2d at 454, 354 N.E.2d at 806, 387 N.Y.S.2d at 66. Thus, the "worksheets in this instance were nothing more than duplicative equivalents of statements previously turned over to the defense—the only difference being as to the particular form in which such statements were recorded." *Id.* Nevertheless, as the District Court pointed out in its opinion, it is highly unlikely that the worksheets contained exactly the same information as the dis-

closed grand jury testimony of the witnesses. *See Flores*, 11 F. Supp. 2d at 312.

After *Consolazio*, however, the Court of Appeals narrowed the scope of the "duplicative equivalent" exception considerably. In *Ranghelle*, the Court of Appeals found that certain memo books not turned over to the defense were not the duplicative equivalent of incident reports that merely transcribed the information in those memo books. *See* 69 N.Y.2d at 65, 503 N.E.2d at 1017, 511 N.Y.S.2d at 586. The prosecution had used the undisclosed memo books to refute the defendant's theory that the victim's testimony with respect to the identity of a robber was inconsistent with the incident report. *See id.*, 69 N.Y.2d at 61-62, 503 N.E.2d at 1014-15, 511 N.Y.S.2d at 583-84. The Court of Appeals concluded that "the People cannot claim the descriptions in the memo books were the 'duplicative equivalents' of the descriptions in the incident reports" because "the descriptions contained in the two materials varied," even though "[t]he inconsistencies were minor." *Id.*, 69 N.Y.2d at 65, 503 N.E.2d at 1017, 511 N.Y.S.2d at 586; *see also Young*, 79 N.Y.2d at 370, 591 N.E.2d at 1166, 582 N.Y.S.2d at 980 (concluding that an undisclosed unusual incident report containing a reference to "rope-burn marks" not contained in another report could not be a duplicative equivalent); *cf. Joseph*, 86 N.Y.2d at 569, 658 N.E.2d at 998, 635 N.Y.S.2d at 125 (noting "the need for a precise correlation between the undisclosed and disclosed material" to consider the possibility that the documents may be duplicative equivalents, and therefore, holding that "a document that has been lost or destroyed and is therefore no longer available for judicial inspection cannot be deemed the 'duplicative equivalent' of *Rosario* material that has previously been disclosed").

In this case, given the New York Court of Appeals' narrow approach to the "duplicative equivalent" exception to *Rosario*,

we disagree with the District Court's conclusion that the statements contained in the memo book were the duplicative equivalent of those in the police report. Plainly, there are differences in the statements recorded in the two documents. The District Court identified two: (1) the memo book states that the "victim notified mother," while the police report merely states that the victim's mother reported the incident; and (2) the memo book reports that the victim "was sodomized by neighbor while he went to play [there] with perps children," while the report says that the crime took place when the victim was "playing at neighbors apt." and "while going to a neighbor's house to play." *Flores*, 11 F. Supp. 2d at 313. While these inconsistencies may be "minor," *Ranghelle*, 69 N.Y.2d at 65, 503 N.E.2d at 1017, 511 N.Y.S.2d at 586, they nevertheless exist, and "[t]wo documents cannot be 'duplicative equivalents' if there are variations or inconsistencies between them," *Young*, 79 N.Y.2d at 370, 591 N.E.2d at 1166, 582 N.Y.S.2d at 980.

Moreover, we also do not agree with the District Court's conclusion that the omissions in the police report contained in the memo book furnish no basis for cross-examination. *See Flores*, 11 F. Supp. 2d at 313-14. At the outset, we note that while the utility of such omissions or differences for cross-examination purposes may be the underlying purpose for the *Rosario* rule and for the "duplicative equivalent" exception to that rule, *see Young*, 79 N.Y.2d at 370, 591 N.E.2d at 1166, 582 N.Y.S.2d at 980, the Court of Appeals has eschewed a harmless error analysis in favor of limited exceptions to the general rule. Thus, ordinarily *Rosario* is a *per se* rule requiring reversal and a new trial where the prosecution fails to deliver a witness's statements to the defense, regardless of the actual value to the defense of the material. *See Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585. Similarly, while the "duplicative equivalent" exception

applies to situations where there are no "variations or inconsistencies" between two documents containing statements of a witness, *Young*, 79 N.Y.2d at 370, 591 N.E.2d at 1166, 582 N.Y.S.2d at 980, we have no basis under New York law to inquire into the utility of the withheld document for cross-examination purposes.

In any event, even if the utility of the material were relevant to our analysis, we believe the District Court construed the value of the additional statements of a witness for cross-examination purposes too narrowly. The District Court focused on the fact that because the memo book and the police report contained the same statement of the victim's mother recorded in two different ways, there could be no impeachment value to the memo book. *Flores*, 11 F. Supp. 2d at 313-14. However, the additional information in the memo book contained in the mother's statement serves the purpose of providing the defense attorney with a more complete picture of the facts for cross-examination purposes. *Cf. Ranghelle*, 69 N.Y.2d at 64, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585 (noting that although a description contained in a complaint report was consistent with a witness's testimony, "it lacked essential details to which she later testified at trial, omissions which might have constituted important material for cross-examination"). Here, we can think of several possible uses for the statements pointed out by the District Judge. First, the fact that the victim's mother told Officer Pabon that the victim went to "play . . . with perps children" makes clear that other persons (Flores's children) were on the premises, and that there was a reason for the victim's presence other than play or games arranged by Flores for the two of them alone. Second, the memo book states that the "victim notified mother," while there is no such statement on the police report. This difference might well have served defense counsel in his attempt to question the motivation of the vic-

tim's mother, whom counsel tried to show did not like Flores even prior to the assault. *See, e.g.*, Trial Transcript at 119.

Accordingly, we conclude that the memo book contains the statements of the victim's mother and that these statements constitute *Rosario* material because they are not the duplicative equivalent of other statements turned over to the defense.

II. *Ineffective Assistance of Counsel*

A. *Counsel's Performance*

We turn next to the question of whether defense counsel's waiver of this *Rosario* claim constitutes ineffective assistance of counsel. Under the *Strickland* analysis, we consider first whether counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, *quoted in McKee v. United States*, 167 F.3d 103, 106 (2d Cir. 1999). We examine an attorney's performance "as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690, and we "may not use hindsight to second-guess his strategy choices," *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994).

This case is similar to *Mayo v. Henderson*, where the petitioner alleged that his appellate counsel had waived a "particularly strong" *Rosario* claim based on the prosecution's failure to turn over memo books that had resulted in the vacatur of his co-defendant's conviction by the New York Court of Appeals in *Ranghelle*, 69 N.Y.2d at 63, 503 N.E.2d at 1016, 511 N.Y.S.2d at 585. *Mayo*, 13 F.3d at 530-31, 534. In that case, we concluded "that counsel's failure to raise the *Rosario* claim on [direct] appeal fell so far below the

accepted level of competence as to deny Mayo his constitutional right to counsel." *Id.* at 536. Here, trial counsel waived a potential *Rosario* claim that would have entitled the petitioner to a new trial had it been raised before the trial court. Indeed, denial of the motion would have constituted *per se* reversible error on direct appeal. The only basis for this waiver was counsel's misunderstanding of *Rosario* and the failure to realize that harmless error did not apply. Indeed, the trial court even warned the prosecutor that the failure to turn over the memo books could result in "setting aside the verdict if need be." Despite this suggestion, counsel still waived the claim. Under the circumstances, trial counsel's performance was objectively unreasonable.

B. *Prejudice*

Under the second prong of the *Strickland* test, Flores must show that his counsel's deficient conduct prejudiced his defense. Prejudice is established if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, *quoted in Bunkley v. Meachum*, 68 F.3d 1518, 1521 (2d Cir. 1995).

The respondent argues, as it did below, that in light of the Supreme Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), we should not apply an outcome determination test but should instead focus more broadly on "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Id.* at 372. Like the District Court, *see Flores*, 11 F. Supp. 2d at 305-06, we reject this argument. *Fretwell* involved a claim of ineffective assistance of trial counsel based on the lawyer's failure to raise at the petitioner's state court sentencing an

objection supported by then-existing federal law in the Eighth Circuit. *See id.* at 367. However, by the time the § 2254 petition was considered in federal court, the Eighth Circuit had overruled the precedent upon which the petitioner relied. *See id.* at 368. The Supreme Court explained that "the 'prejudice' component of the *Strickland* test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair," *id.* at 372, and therefore, the petitioner did not suffer prejudice because he had no right "to have the state court make an error in his favor," *id.* at 371 (internal quotation marks omitted).

However, as Justice O'Connor explained in her concurring opinion in *Fretwell*, the majority's holding was "narrow" and merely "identifies another factor that ought not inform the prejudice inquiry"—specifically, the possibility that a state court may make an error in the petitioner's favor. *Id.* at 374 (O'Connor, J., concurring). Thus, in all but a few cases, the basic *Strickland* prejudice inquiry applies and "[t]he determinative question—whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'—remains unchanged." *Id.* at 373 (O'Connor, J., concurring) (quoting *Strickland*, 466 U.S. at 694) (citation omitted).

Since *Fretwell*, we have continued to find that a petitioner suffers prejudice where there exists a "reasonable probability" that the result "would have been different," *Strickland*, 466 U.S. at 694. Thus, in *Bunkley*, we explained that "where the underlying claim involves only state law, looking to the probable outcome of the direct appeal in state court will be adequate under federal constitutional law doctrine to preserve confidence in the outcome and protect the defendant from prejudice." 68 F.3d at 1522-23. In other cases following *Fretwell* that do not involve the possibility that a state court

would err in the petitioner's favor, we have looked solely to the language of *Strickland* and its explanation that prejudice results if there is a reasonable probability of a different outcome. *See, e.g., McKee*, 167 F.3d at 106-08; *Mayo*, 13 F.3d at 534-36; *cf. Grady v. Artuz*, 931 F. Supp. 1048, 1062 (S.D.N.Y. 1996).

Accordingly, to determine whether Flores suffered prejudice, we look to whether there was a reasonable probability that the outcome would have been different. Here, Flores's trial counsel waived a strong *Rosario* claim without reason, without consulting Flores, and despite the trial judge's warning to the prosecution that it risked an order setting aside the verdict for failure to turn the memo book over to the defense. There is at least a reasonable probability under these circumstances that had that *Rosario* claim been pressed, Flores would have been granted a new trial by the trial court or on appeal. *See Mayo*, 13 F.3d at 536 (concluding that the petitioner suffered prejudice when appellate counsel waived a *Rosario* violation because there was a reasonable probability had it been raised on appeal that the petitioner would have received a new trial). Thus, Flores has shown the required prejudice.

CONCLUSION

For the foregoing reasons, we conclude that the performance of Flores's trial counsel fell below an objective standard of reasonableness and that Flores was prejudiced as a result. Accordingly, we reverse the decision of the District Court and remand for the entry of judgment conditionally granting the writ and ordering Flores's release unless the State provides him a new trial within such reasonable period as the District Court shall set.

VAN GRAAFEILAND, *Senior Circuit Judge*, dissenting:

On this appeal, my colleagues suggest that I join them in holding that Rafael Flores has been incarcerated wrongfully for the past ten years and that the responsibility for this great wrong rests on the shoulders of his former attorney, Robert Katz. In short, the issue, as my colleagues frame it, is not whether Flores sodomized Miguel S.; the evidence is clear that he did. In effect, therefore, we are asked to pass judgment on the lawyer, Robert Katz, not the defendant, *i.e.*, "to grade counsel's performance," a task we are not authorized to perform in this habeas corpus proceeding. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("The object of an ineffectiveness claim is not to grade counsel's performance."). As the competent and widely respected former district judge, Edward Weinfeld, put it in *United States ex rel. Butler v. Schubin*:

> *Rosario* is grounded in the State's common law, and if petitioner was wrongly denied tapes he was entitled to receive under that doctrine, no violation of federal constitutional rights is presented. Thus, assuming the State courts were in fact in error in interpreting the scope of the *Rosario* rule, it was one of state law that is not subject to a review under a petition for a federal writ of habeas corpus charging infringement of federal constitutional rights.

376 F. Supp. 1241, 1247 (S.D.N.Y. 1974), *aff'd*, 508 F.2d 837 (2dCir. 1975) (footnotes omitted).

It is evident from the cases hereafter cited that the doctrine, as thus set forth, is concurred in by a long line of consistent federal authority. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) ("[F]ederal habeas corpus relief does not lie for errors of state law" (citations and internal quotations omitted)); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("A fed-

erally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution"); *Rose v. Hodges*, 423 U.S. 19, 21 (1975) (necessary predicate for granting of federal habeas relief is determination that custody violates the Constitution, laws, or treaties of the United States); *Quartararo v. Hanslmaier*, 186 F.3d 91, 97 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 1196 (2000) ("[F]ederal habeas corpus relief does not lie for errors of state law." (quoting *Estelle*, 502 U.S. at 67)); *Headley v. Tilghman*, 53 F.3d 472, 474 (2d Cir. 1995) ("A state prisoner is entitled to habeas relief only if he is being held in custody in violation of a federal right." (citations omitted)); *Manning v. Warden*, 786 F.2d 710, 712 (5th Cir. 1986) ("Whether the state followed its own procedure is not the concern of a federal habeas court."); *Stephens v. Costello*, 55 F. Supp. 2d 163, 167 (W.D.N.Y. 1999) ("[F]ailure to turn over *Rosario* material is not a basis for habeas relief as the *Rosario* rule is purely one of state law." (quoting *Green v. Artuz*, 990 F. Supp. 267, 274 (S.D.N.Y. 1998))); *Morrison v. McClellan*, 903 F. Supp. 428, 429 (E.D.N.Y. 1995) ("Any error under *Rosario* at trial would be a violation of state law, and, thus, not subject to review under a petition for a writ of habeas corpus."); *Camara v. Scully*, 624 F. Supp. 106, 108 (S.D.N.Y. 1985) ("A federal court on a petition for writ of habeas corpus may interfere in state criminal proceedings only to correct errors of constitutional dimension." (citations omitted)).

Flores does not strengthen his *Rosario* argument by clothing it in the garb of ineffective assistance of counsel. A violation of *Rosario* does not constitute per se ineffective assistance of counsel. *Boyd v. Hawk*, 965 F. Supp. 443, 453 (S.D.N.Y. 1997); *Colson v. Mitchell*, 798 F. Supp. 966, 973 (E.D.N.Y. 1992); *People v. Nuness*, 159 A.D.2d 970, 970 (N.Y. App. Div. 1990). The standard for deciding whether

habeas relief must be granted is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (internal quotations omitted). My colleagues distort this principle by arguing that a state appellate court might make a *Rosario* grant of a new trial despite the absence of a showing that the jury was improperly influenced in any manner. I believe there must be a showing of actual prejudice before a federal court can act. *Cousart v. Hammock*, 745 F.2d 776, 778 (2d Cir. 1984).

I write this dissent because I want Mr. Katz to know that one judge believes he is being unfairly stigmatized by an opinion issued in excess of our authority.

Appendix B - *Flores v. Demskie*
11 F.Supp.2d 299 (S.D.N.Y. 1998)

United States District Court,
S.D. New York.
Rafael FLORES, Petitioner,
v.
Joseph DEMSKIE, Acting Superintendent, Woodbourne Correctional Facility,
Respondent.
No. 96 Civ. 2891(MBM).
May 19, 1998.

MUKASEY, District Judge.

However true it may be that, as the judicial bromide has it, hard cases make bad law,[1] it is truer still that bad law makes hard cases. This is one of them.

As set forth in greater detail below, the petitioner in this case, Rafael Flores, was convicted in Supreme Court, Bronx County, of sodomy in the first degree in violation of New York Penal Law § 130.50[1], "arising out of his deviate sexual intercourse with a six-year-old boy who lived in [his] apartment building." People v. Flores, 84 N.Y.2d 184, 186, 615 N.Y.S.2d 662, 639 N.E.2d 19 (1994). At trial, the prosecutor failed to turn over to

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[1] Probably the most frequently cited invocation of that hypothesis is Justice Holmes' statement, dissenting in the Northern Securities case, that "Great cases, like hard cases, make bad law." *Northern Securities Co. v. United States*, 193 U.S. 197, 364, 24 S.Ct. 436, 48 L.Ed. 679 (1904). He took it as well established, even in 1904, that hard cases make bad law, and went on to assert that the same is true of great cases because great cases are so called due to their tendency to excite "overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Id.* I have also heard it said that easy cases make bad law because their apparent simplicity invites carelessness of thought and word, which results in rules ill suited to more complex cases.

defense counsel until after the verdict a police officer's memo book that contained a brief record of information arguably provided by the victim's mother, who testified at trial. The bad law in question is a rule fashioned by the New York Court of Appeals, holding that failure by a prosecutor to turn over to a defendant before the close of evidence the prior statement of a witness called by the prosecutor at trial is automatically grounds for a new trial, with no harmless error analysis permitted if the issue is raised on direct appeal of the conviction rather than on collateral attack. Failure to deliver such material "constitutes per se error requiring that the conviction be reversed and a new trial ordered." *People v. Ranghelle*, 69 N.Y.2d 56, 63, 511 N.Y.S.2d 580, 585, 503 N.E.2d 1011 (1986) (citation omitted). "The reasoning that spawned the *Rosario* rule [requiring such statements to be turned over to defense counsel] led us also to eschew harmless error analysis in cases arising during direct appeal in which the defendant was deprived of *Rosario* material at trial." *People v. Banch*, 80 N.Y.2d 610, 615, 593 N.Y.S.2d 491, 494, 608 N.E.2d 1069 (1992) (citations omitted). See also *People v. Young*, 79 N.Y.2d 365, 370, 582 N.Y.S.2d 977, 980, 591 N.E.2d 1163 (1992). Flores' lawyer at trial failed to take advantage of that rule, conceding instead that the entry in the memo book would have made no difference in what he did or how he questioned the mother at trial. Flores' petition in this court, pursuant to 28 U.S.C. § 2254, argues that his lawyer's candor deprived him of an automatic new trial and therefore of the effective assistance of counsel within the meaning of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Because of the New York rule referred to above, this case cannot be decided based merely on a straightforward analysis of whether petitioner was deprived in any meaningful sense of a fair trial. *See, e.g., Rosario v. Kuhlman*, 839 F.2d 918, 925 (2d Cir.1988) ("[T]he writ would issue only where [the] petitioner can show that the error deprived [him] of a fundamentally fair

trial.") (quoting *Taylor v. Curry*, 708 F.2d 886, 891 (2d Cir.), *cert. denied*, 464 U.S. 1000, 104 S.Ct. 503, 78 L.Ed.2d 694 (1983)) (emphasis in original). Instead, what follows is a detailed review of the procedural course of this case through the state courts and before a Magistrate Judge of this court, a discussion of why I cannot affirm on the grounds set forth in the Report,[2] a brief foray into habeas corpus procedure in federal courts before enactment of the Antiterrorism and Effective *302 Death Penalty Act of 1996, 110 Stat. 1214, ("AEDPA"), findings of fact based on an evidentiary hearing I felt the need to hold, application of the rule at issue to the facts disclosed at that hearing, and finally resolution of a state law question never examined by the courts of New York on either direct review or collateral attack of Flores' conviction: whether the withheld material was the "duplicative equivalent" of material that was turned over, within the meaning of *People v. Consolazio*, 40 N.Y.2d 446, 454, 387 N.Y.S.2d 62, 66, 354 N.E.2d 801 (1976), and related cases, and therefore whether there was no violation of the rule at issue in the first place and hence no prejudice to Flores from whatever defects there may have been in the assistance provided by his counsel.

For the reasons set forth below, that convoluted process yields the same result as would a simple harmless error analysis. Accordingly, the writ is denied and the petition is dismissed.

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[2] References to the "Report" are to the May 13, 1997 Report and Recommendation of Magistrate Judge James C. Francis IV, to whom this case was initially referred and who recommended denial of the petition. I reach the same result recommended by the Magistrate Judge, although for different reasons. Because both petitioner and respondent object to the Report, I have relied on it only insofar as it is either not controverted or agrees with my own reading of the record, which I have reviewed de novo.

I.

A. Procedural History in State Court

1. Trial and Direct Appeal

On October 16, 1990, petitioner was convicted in New York State Supreme Court, Bronx County, of four counts of sodomy in the first degree and was sentenced on November 9, 1990 to four concurrent terms of imprisonment of five to 15 years. (Report at 1) Petitioner's trial attorney discovered during jury selection that the prosecution had failed to produce the memo book of a police officer who had interviewed the victim's mother. (*Id.* at 2) Although the victim's mother testified as a witness at trial, the police officer did not. (Tr. 36)[3]

Again, under New York's *Rosario* rule, the prosecution must produce before trial any written or recorded statements made by a person whom the prosecution intends to call as a witness. N.Y.Crim. Proc. Law § 240.45(1)(a) (McKinney 1993) (codifying *People v. Rosario*, 9 N.Y.2d 286, 213 N.Y.S.2d 448, *cert. denied*, 368 U.S. 866, 82 S.Ct. 117, 7 L.Ed.2d 64 (1961)). The prosecution's failure to disclose *Rosario* material before the conclusion of the trial is per se reversible error. *See Ranghelle*, 69 N.Y.2d at 63, 511 N.Y.S.2d at 585.

Although petitioner's trial attorney learned of the memo book entry during jury selection, he did not alert the court to its existence until after the prosecution presented its case. (Report at 2) When told that *Rosario* material remained undisclosed, the Court voiced exasperation with the prosecution: "The Court of

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[3] "Tr." refers to the transcript of an evidentiary hearing held on December 12, 1997.

Appeals has made it clear that we have to give these memo books over to the defense and here we are, the last day, thinking of charging the jury in a case that clearly must be reversed if you don't turn over the memo books." (Pet. Ex. J, Trial Tr. at 167) The Court then permitted the defendant's case to proceed and adjourned the trial until the prosecutor provided the missing memo book entry. (Report at 3) The following day, the prosecutor informed the Court that he could not obtain the memo book from the police officer. (*Id.*) The Court decided to charge the jury, and ordered that the "Court will have [counsel] preserve his exceptions for the record with respect to that memo book." (*Id.* at 4 (quoting Trial Tr. at 238)) The Court added, "When and if the memo book becomes available, it will be turned over to counsel and if counsel feels that it's appropriate, he will make whatever motions he deems necessary on behalf of his client even to the extent of setting aside the verdict if need be." (*Id.*) After the verdict but before sentencing, the prosecutor provided defense counsel with the memo book, of which more later. (*Id.*) At petitioner's sentencing, defense counsel told the Court that he had reviewed the memo book and had concluded that "there is absolutely nothing in the memo book that would have made any difference in terms of what I did or did not do, ask or did not ask and that's about it." (*Id.* (quoting Sentencing Tr. at 2)) The Court then asked whether defense counsel wished to make a motion with respect to the verdict, and counsel moved to set aside the verdict only as against the weight of the evidence, not on the basis of the *Rosario* violation. (*Id.*)

*303 On direct appeal, Flores argued both that the *Rosario* violation compelled automatic reversal and that his lawyer's failure to argue the point at sentencing deprived him of effective assistance of counsel. In July 1993, the Appellate Division, First Department unanimously affirmed the conviction. Its reasoning, notwithstanding the per se reversible error rules described in *Ranghelle* and *Banch, supra*, was as follows:

> Implicit in the rule that a guilty verdict is to be vacated in the event of non-disclosure of *Rosario* material is a requirement that the material might have been of some value to the defense, although the defendant is under no burden to show how (*cf.*, *People v. Jones*, 70 N.Y.2d 547, 552, n. 4, 523 N.Y.S.2d 53, 517 N.E.2d 865 [1987]). When counsel candidly denies having any use for the material when it is finally disclosed, it cannot be said that the defendant has any substantive right to be vindicated, and there is no basis in law or logic to order a new trial when there is no new issue to be tried. There is no basis in the record to controvert counsel's conclusions, and neither can counsel's representation by deemed incompetent merely because he did not pursue a concededly frivolous substantive claim as a basis for a new trial.

People v. Flores, 194 A.D.2d 439, 599 N.Y.S.2d 255, 256 (1st Dep't 1993). The footnote from *Jones* cited with the signal "cf." is simply a discussion rejecting harmless error analysis when *Rosario* material has been withheld on the ground that such analysis would require "sheer speculation as to what might have occurred and matters not in the record...." *Jones*, 70 N.Y.2d at 552 n. 4, 523 N.Y.S.2d at 56 n. 4, 517 N.E.2d 865.

On July 7, 1994, the Court of Appeals affirmed, with two judges dissenting. *Flores*, 84 N.Y.2d at 189, 615 N.Y.S.2d at 665, 639 N.E.2d 19. The majority brushed off the underlying Rosario claim, noting that there had been "no acknowledgement that [the memo book] even technically qualified as *Rosario* material." Id. 84 N.Y.2d at 186, 615 N.Y.S.2d at 663, 639 N.E.2d 19. The majority rejected the ineffective assistance of counsel claim as follows:

> For all this record reveals about defense counsel's ultimate evaluation of the disclosed item, on the scene

> and in the circumstances at that postverdict stage of the criminal proceeding, defense counsel could have reasonably considered that his client's interest would best be served by no further delay in the resolution of the case against the client. Any number of other professional strategic reasons or personal considerations affecting the defendant's fair trial interests could also have informed the attorney's professional evaluation and choice on how and why to proceed in the way chosen. The record does emphatically inform us, even as an appellate court reviewing the matter, of the defense lawyer's assessment of the quality and nature of the ultimately disclosed item--'absolutely' useless. A plausible strategy might even have included advocacy for amelioration of sentence or some other nuanced advantage in the adversarial exchanges and context, all matters and features not knowable by trial or appellate Judges removed from the full range of choices and context exercised singularly by the trial lawyer for the defendant. In sum, *Rosario* was designed to insure that defense counsel, not Judges, should do the strategic viewing, weighing and exercising of the defendant's fair trial advocacy interests in this regard.

Id., 84 N.Y.2d at 188, 615 N.Y.S.2d at 664, 639 N.E.2d 19 (citation omitted).

2. Collateral Proceedings in State Court

Unbeknownst to the Court of Appeals majority, its conjecture that defense counsel had made a strategic choice not to move for a new trial based on a *Rosario* violation, but instead to pursue some unspecified "nuanced advantage", had been undermined even before those words were written. In July 1992, a year before the Appellate Division affirmed the conviction on direct appeal, *Flores* moved pursuant to § 440.10 of New York's

Criminal Procedure Law to set aside his conviction, based in part on ineffective assistance of counsel. Submitted with that motion was the affirmation of his trial counsel averring, under penalty of perjury, that at the time he acknowledged the uselessness of the memo book at sentencing, *304 I was not aware that the failure to turn over the memo book, unless waived, was per se reversible error that would have required vacatur of Mr. Flores' conviction. I believed that to prevail on a *Rosario* claim I would have to show prejudice. (Pet. Ex. L ¶ 7)

On December 4, 1992, the trial court denied the motion without a hearing. That Court acknowledged that it had virtually invited a new trial motion during colloquy about the missing memo book while the trial was ongoing, but noted that the motion it had in mind was an immediate motion pursuant to § 330.30 of New York's Criminal Procedure Law to set aside the jury verdict, not a motion two years after the conviction pursuant to § 440.10. (Pet. Ex. G at p. 3) That Court also expressed the assumption that the disposition of the § 440.10 motion would be "incorporated in defendant's direct appeal." (*Id.*) The motion and its disposition apparently were not so incorporated, an omission that permitted the Court of Appeals to speculate about defense counsel's quest for "nuanced advantage" when the factual record reposing in the court below showed that defense counsel had undertaken no such quest.

On February 4, 1993, the Appellate Division, First Department, denied petitioner's application for leave to appeal, effectively ending petitioner's collateral attack on his conviction in the state courts.

B. Procedural History in Federal Court

1. Proceedings Before The Magistrate Judge

Petitioner then filed this petition, claiming that he was denied his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution by his counsel's failure to move to set aside the conviction based on the *Rosario* violation, and by his counsel's comments concerning the uselessness of the alleged *Rosario* material. (Petition ¶ 22)

In his Report, Magistrate Judge Francis applied the two-part *Strickland* test for ineffective assistance of counsel, which requires a petitioner to show (i) that his lawyer's conduct fell below "an objective standard of reasonableness" defined by "prevailing professional norms", and (ii) that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694, 104 S.Ct. 2052. Under *Strickland*, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances" and "the defendant must overcome the presumption that, under the circumstances, the challenged actions 'might be considered sound trial strategy.' " 466 U.S. at 688-89, 104 S.Ct. 2052 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). Without holding an evidentiary hearing to determine whether the withheld memo book was in fact *Rosario* material, the Magistrate Judge found that although defense counsel's performance was deficient, petitioner had not established the prejudice prong of the *Strickland* test.

The Magistrate Judge found that counsel's failure to move for a new trial based on per se reversible error was objectively unreasonable. He found that the statements in counsel's affidavit that he was unaware of the per se rule and thought he would have to make a showing of prejudice, show that his decision not

to press the *Rosario* issue did not arise from "either a reasonable professional judgment or a reasoned strategic choice, but rather a complete misunderstanding of prevailing law." (Report at 12). However, he found that petitioner had failed to meet *Strickland*'s prejudice prong. He reasoned that the prejudice inquiry differs for trial and appellate counsel. According to the Magistrate Judge, the test to be applied to determine prejudice resulting from trial counsel's performance is " 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.' " (Report at 13) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)) On the other hand, to establish prejudice resulting from appellate counsel performance, a petitioner must show " 'that there was a reasonable probability that [his] claim would have been successful before the [state's highest court].' " (*Id.*) (quoting *305 *Mayo v. Henderson*, 13 F.3d 528, 534 (2d Cir.), *cert. denied*, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 35 (1994)) The Magistrate Judge applied the trial counsel standard and found that petitioner had failed to demonstrate that his attorney's deficient performance rendered his trial unreliable or unfair. (*Id.* at 14-15).

2. Proceedings Before This Court

(i) Objections to the Report

Petitioner objects to the Magistrate Judge's decision relating to the prejudice prong, and respondent to the Magistrate Judge's disposition of the performance prong. Pursuant to Fed.R.Civ.P. 72(b), a district court may adopt those parts of a magistrate judge's report and recommendation to which no specific objection is made, provided those parts are not clearly erroneous. *Thomas v. Arn*, 474 U.S. 140, 149, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985). However, the district court must make a de novo determination regarding those parts of the report to which any party objects. See *id.* Because the parties object to the

Magistrate Judge's findings on both prongs of the *Strickland* test, a de novo review as to both is necessary.

(ii) The Report Considered

I cannot affirm for the reasons contained in the Report. To begin with, I disagree with the Magistrate Judge's conclusion that petitioner's attorney was acting as trial counsel, rather than as appellate counsel, at the sentencing proceeding. Counsel made the alleged error after the completion of the trial, and the error concerned the failure to make a motion to set aside the verdict on a particular ground. At that stage, as petitioner argues, defense counsel was acting in the role of appellate counsel, i.e., reflecting on the conduct of the trial and raising errors of state or federal law. Counsel's failure to make this motion amounted to a virtual waiver of the issue for appeal.

[1] In any event, I disagree with the Magistrate Judge's differentiation between the prejudice inquiry for trial and appellate counsel. There is no basis in Second Circuit case law for distinguishing between trial and appellate counsel prejudice. *See Bunkley v. Meachum*, 68 F.3d 1518, 1521, 1523 (2d Cir.1995) (applying undifferentiated *Strickland* standard to conduct of appellate counsel); *Mayo*, 13 F.3d at 533 (same); *Claudio v. Scully*, 982 F.2d 798, 803 (2d Cir.1992) ("Although *Strickland* addressed the constitutional standard for ineffective assistance of counsel in the trial counsel context, our Circuit has adopted the *Strickland* two-prong test in assessing the effectiveness of appellate counsel."), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993).

Further, the Magistrate Judge relied too heavily upon *Fretwell* to make this distinction between trial and appellate counsel and to require a showing of unreliability in the trial or unfairness in the proceeding for every error by counsel. In *Fretwell*, the petitioner claimed that his attorney was ineffective because his

counsel failed to object at the sentencing proceeding to an error that at the time mandated reversal of the death penalty under Eighth Circuit precedent. However, in the interim, the Eighth Circuit had overruled its earlier decision, and the alleged defect was no longer considered a constitutional violation necessitating reversal. *Fretwell*, 506 U.S. at 367-68, 113 S.Ct. 838. The Court stated that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.* at 369, 113 S.Ct. 838. The Court found that the sentencing proceeding was not unfair or unreliable because "counsel's error would have deprived respondent of the chance to have the state court make an error in his favor." *Id.* at 371, 113 S.Ct. 838 (quotations and citations omitted). The Court added, "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372, 113 S.Ct. 838. Thus, in *Fretwell*, the Court declined to find prejudice when, although counsel's objection would have altered the outcome of the proceeding, that change in outcome would have been based on an incorrect interpretation of the law which had since been corrected.

*306 [2] *Fretwell*'s scope is limited. The *Strickland* test--whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052--was not overruled by *Fretwell*. Rather, as Justice O'Connor stated in her concurring opinion, the Court's holding was narrow: "Specifically, today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." *Fretwell*, 506 U.S. at 374, 113 S.Ct. 838 (O'Connor, J., concurring).

[3] The Second Circuit has similarly recognized *Fretwell*'s narrow holding. In *Bunkley*, the Second Circuit faced the problem in *Fretwell*-- i.e., the state courts had misinterpreted federal precedent, and thus although the outcome in state court would have been different had counsel raised an issue on appeal, a proper interpretation of federal law would not have altered the result. *Bunkley*, 68 F.3d at 1520-21. *Bunkley*, in discussing *Fretwell*, noted that when a petitioner claims ineffective assistance of appellate counsel, "where the underlying claim involves only state law, looking to the probable outcome of the direct appeal in state court will be adequate under federal constitutional doctrine to preserve confidence in the outcome and protect the defendant from prejudice." Id. at 1522-23.[4] Thus, *Fretwell* does not dictate that a Court always inquire into the reliability and fairness of the proceeding in addition to whether the outcome would have been different; rather, its fairness and reliability inquiry applies only in limited circumstances--i.e., when the state or lower court creates a rule favorable to the defendant based on an erroneous interpretation of federal law. *See also Grady v. Artuz*, 931 F.Supp. 1048, 1062 (S.D.N.Y.1996); *see also Boria v. Keane*, 99 F.3d 492, 497 (2d Cir.) (applying outcome-determination test to trial counsel performance), clarified on reh'g on other grounds, 90 F.3d 36 (1996), *cert. denied*, 521 U.S. 1118, 117 S.Ct. 2508, 138 L.Ed.2d 1012 (1997).

Here, the additional *Fretwell* inquiry is not required. There is no incorrect state interpretation of federal law at issue. However, in order to determine whether there would have been merit to the argument defense counsel failed to make, it is necessary to determine whether the undisclosed material here justified making

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[4] Significantly, although the Magistrate Judge suggested that *Fretwell* was applicable only to ineffective assistance of trial counsel claims, *Bunkley* applied it to an ineffective assistance of appellate counsel claim. *Bunkley*, 68 F.3d at 1523.

it. If it did, then defense counsel failed to raise an issue of state law which appears well settled and which the Court of Appeals has recently recognized. *See People v. Machado*, 90 N.Y.2d 187, 191, 659 N.Y.S.2d 242, 244-45, 681 N.E.2d 409 (1997). The outcome-determination test applies.

Moreover, even if *Fretwell*'s fairness and reliability inquiry did apply, it would not dictate a different result from the outcome determination test. That *Fretwell* test requires that the Court determine whether the proceeding was unfair, i.e., whether petitioner was deprived of any substantive or procedural right. Here, petitioner argues that he was deprived at least of a new trial because his lawyer was not aware that he could have moved for one without showing prejudice. A defendant with competent counsel, petitioner argues, would have received a new trial, while petitioner did not. This, if he is correct, was unfair.

[4] Finally, I cannot accept respondent's argument that the *Fretwell* test applies to every ineffective assistance of counsel claim, because that would mean that ineffective assistance of appellate counsel could never be found unless the trial was unreliable or unfair. However, this is clearly not the law. *See Mayo*, 13 F.3d at 534 ("To establish prejudice in the appellate context, a petitioner must demonstrate that [his] claim would have been successful before the [state's highest court]."") (quotations and citations omitted; alterations in original). Rather, prejudice is demonstrated when the argument that appellate counsel failed to raise on appeal *307 would have been successful when properly analyzed under controlling law.

(iii) The Evidentiary Hearing and the *Rosario* Issue

Among respondent's arguments opposing the Magistrate Judge's finding of ineffective assistance was that there had been no showing that the police memo book in question contained *Rosario* material. Absent such a showing, respondent argued,

counsel could not have been ineffective in failing to move for a new trial based on non-production of *Rosario* material.

Although one would assume that the trial court to which such a motion was addressed would have held a hearing to resolve that issue, *see Young*, 79 N.Y.2d at 372, 582 N.Y.S.2d at 981, 591 N.E.2d 1163 (remanding to trial court for hearing to determine whether withheld report contains *Rosario* material), respondent opposed such a hearing in this court. Respondent argued both that the revisions to 28 U.S.C. § 2254 wrought by the AEDPA bar such a hearing, and that prior law requires the same result because petitioner's failure to develop the record on that issue in state court cannot be excused by cause external to himself and resulting prejudice. Subsection (e)(2) of § 2254 does bar evidentiary hearings in federal court to develop the factual basis for a claim unless that claim arises from either newly discovered evidence or a new rule of constitutional law that is retroactive, and the facts underlying that claim would show by clear and convincing evidence that no reasonable jury would have convicted the petitioner. Neither is true here, but this petition was filed before the effective date of that section, and the statute is not retroactive. See *Lindh v. Murphy*, 521 U.S. 320, ----, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997); *Boria*, 90 F.3d at 38.

[5] Moreover, under the statute before it was revised by the AEDPA, a district court had discretion to grant a hearing in all cases, and was required to hold an evidentiary hearing when the failure to develop the record in state court was excused by cause and prejudice. *See Pagan v. Keane*, 984 F.2d 61, 64 (2d Cir.1993). Factors relevant to the exercise of that discretion include: the existence of a factual dispute, the strength of the proffered evidence, the thoroughness of prior proceedings, and the nature of the state court determination. *Id.* In this case, there was a factual dispute as to whether the memo book constituted *Rosario* material; the proffered evidence, consisting of the memo

book entries and portions of the testimony of the victim's mother, suggested she might have been the source of some of those entries, although respondent argued that so might the child's school guidance counsellor, who did not testify at trial; prior proceedings had not determined this issue; and the state courts had made no findings on this issue. Moreover, even under respondent's view of the law, it is at least arguable that trial counsel's decision to forgo the *Rosario* issue, based not on an informed and strategic choice but rather on ignorance, was a cause external to *Flores*, that prejudice could be shown to have resulted if it were shown that the withheld record contained *Rosario* material, and that the lost opportunity even to try to make that showing was itself prejudice. In these circumstances, I elected to hold an evidentiary hearing.

Two witnesses testified at the hearing. One was former police officer Karen Pabon, the author of the memo book entries at issue (Pet.Ex. 2) and the author also of a police report that was turned over as *Rosario* material at trial. (Pet.Ex. 3) Not surprisingly, she had only a vague recollection of the events, which had occurred in 1989 and had resulted in a trial in which she was not called as a witness. (Tr. 15, 29, 30, 36, 38, 57) However, she did testify at the hearing, based principally on her memo book entries and the police report she had prepared, that while she was on duty on January 30, 1989, she received a call at about 11:40 a.m. reporting a sexual assault, and responded to P.S. 211 in the Bronx. There, she spoke to the victim's mother. Because the mother spoke only Spanish and the officer did not, the two conversed through the school guidance counsellor, who acted as interpreter. (Tr. 29) The victim was present, but the officer did not recall speaking with him. (Tr. 38)

*308 [6] The principal issue in dispute at the hearing was the source of entries in Pabon's memo book and her report. Apparently hoping to fit this case within a line of state authority holding that statements reflecting merely a synopsis of events

reported by several witnesses may not constitute *Rosario* material as to any particular witness, *see People v. Scott*, 216 A.D.2d 592, 595, 628 N.Y.S.2d 965, 968 (2nd Dep't 1995), aff'd, 88 N.Y.2d 888, 644 N.Y.S.2d 913, 667 N.E.2d 923 (1996), respondent's counsel pressed the officer to characterize her entries as reflecting such a synopsis, at times successfully. (See Tr. 43-48) However, I attach little weight to those characterizations because the content of the memo book discloses entries containing statements that could have come only from the mother direct to Pabon, based on Pabon's testimony that she spoke to the mother and based also on the police report she wrote, which listed the mother as the reporter of the information it contained. That information was, as set forth more fully below, equivalent in all comparable respects with the corresponding information in the memo book.

Respondent called Lieutenant George Stamp, who at the time of the events in question had been a sergeant and who prepared an unusual incident report[5] on January 30, 1989 based on information conveyed to him by Pabon and another officer. (Pet.Ex. A) That report reflects that Pabon apparently attributed to the guidance counsellor, Hilda Beyares, the information that was attributed to the mother in the police report. From Stamp's unusual incident report, respondent apparently would have me conclude that it was the guidance counsellor and not the mother who provided the information in the memo book, and, inasmuch as the guidance counsellor did not testify at trial, that the memo book entries are not *Rosario* material with respect to the mother, who did testify. I cannot so conclude. Based on Pabon's testimony at the hearing, and a comparison of the memo book entries with the police report she wrote, I find that portions of the memo

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[5] Such a report, as its name suggests, describes an incident, usually a crime, that is beyond the usual mayhem the police encounter in the precinct in question. (Tr. 58)

book that I have specified below do reflect statements from the mother, who testified at trial. To the extent Stamp's unusual incident report suggests that information came from the guidance counsellor, I find that it simply reflects either Stamp's misconception, or a misstatement by Pabon or her colleague. Therefore, the memo book, considered in isolation, does contain *Rosario* material with respect to the victim's mother. Set forth below are all of the entries from the officer's memo book that relate to the incident, line by line, with spelling as in the original and those entries that I find attributable to the mother set forth in italics:

1140-Sexual A ult P.S.211-
1155-1 female & 1 juvenile to
Jacobi Hosp-
1210-At Jacobi Hosp-
Examination done by Dr.
Cohen--Sex Crimes Notified
Castellano-Det Gannon is
Catching-61 # 1145
Aided # 417 Borolog # 317
Sex Crimes Case # 111
Victim [name of victim[6]]
was sodomized by neighbor
while he went to play their
with perps children -
Victim notified mother
Who in turn notified
Guidance counsler Hilda
Beyares. Mother-Carmen
Santiago DOB / /
present at school & at

---

[6] The victim's name appears in the record, but has been omitted from this opinion.

Hospital
1445 EnRt to 48 to Sex Crimes
Unit Det Gannon -
Perp Rafael flores 1997 Hughes
Ave Apt 1L approx 32 M/H-
1500-At 48 pct -
Brady by PO Gleason -
1505 10-61 Sgt Stamp
doing an unusual
D I Luisi Notified
PBBS-Schrepel Notified

*309 (Pet.Ex. 2) The reason for finding that these entries must reflect statements by the victim's mother should be obvious: As noted, the officer said she did not speak with the victim, and the guidance counsellor acted only as a translator; by a process of elimination, only the mother could have conveyed the italicized information.

As was apparent from the hearing, however, the memo book does not stand in isolation. More particularly, the entries in the memo book and those in Pabon's report, to the extent attributable to the victim's mother, were based on the same conversation. (Tr. 29-30) Nobody disputes that Pabon's report was turned over as *Rosario* material at trial. Set forth in the table below are the entries from the memo book, italicized above, that I have found attributable to the mother, and therefore also *Rosario* material, alongside those entries from Pabon's report that are also attributable to the mother. Again, spelling is as it appears in the original documents.

Memo Book Report[7]

Victim [name of victim] was [Offense(s)] Sexual Abuse (Sodomy) [Victim]
sodomized by neighbor while [name of victim] [Actions of Victim Prior to
he went to play their with ... Sex Crimes] playing at neighbors apt. perps children-victim [Reporter/Witness No. 1] Santiago, Carmen
notified mother [Relationship] mother [Perpetrator] Flores,
Mother-Carmen Santiago Perp Raphael 1997 Hughes Ave., Apt. 1L Bx, N.Y.
Rafael flores 1997 Hughes [Sex] M [race] Hisp [date of Birth] unknown
Ave Apt 1L approx 32 M/H- [Age] 32 [Height] 5Ft. 6In. [Weight] 185 [Eye
Color] unkn [Hair Color] blk [Hair Length]
short [Facial Hair] none [Accent] hisp
[Clothing Description] Unknown [Reconstruct
Occurrence] At t/p/o reporter states for
victim that while going to a neighbor's house
to play the above described perp forced
victim to have anal sex with him (penis to

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[7] Bracketed words are printed headings on the form, except for brackets indicating deletion of the victim's name; words outside brackets are typed entries following or beneath those headings.

anus). Victim states that this has been an on

going occurrence for the past years.

Following the hearing, I asked the parties for submissions on the question of whether the statements in the report attributable to the mother were the "duplicative equivalent" of those so attributable in the memo book, within the meaning of *People v. Consolazio*, 40 N.Y.2d at 454, 387 N.Y.S.2d at 66, 354 N.E.2d 801. *Consolazio* held that there can be no *Rosario* violation in failing to turn over statements that are "nothing more than the duplicative equivalents of statements previously turned over to the defense--the only difference being as to the particular form in which such statements are recorded." *Id.* Neither side had briefed or argued that issue until then. Petitioner responded, inter alia, with a long list of differences between the entries in Pabon's memo book and those on the report (Jan. 23, 1998 Letter of Jessica S. Henry, Esq. ("Henry Letter"), at 4-6), a list that is irrelevant insofar as it consists, as it largely does, of entries that obviously do not reflect statements attributable to the victim's mother and therefore are not *Rosario* material as to her. (*See, e.g., id.* at 4, items a-i) However, petitioner argues that because the memo book and the report each contains material that is not found in the other, and omits material that is found in the other, neither can be considered the duplicative of the other. (*Id.* at 3) [7] Respondent's submission argues principally that because petitioner had failed to preserve the argument that the memo book contained *Rosario* material, "this factual issue cannot be considered by this Court because it is unexhausted," such lack of exhaustion being "a direct result of petitioner's failure to present the state court with ... a preserved claim of *Rosario* error." (Jan. 27, 1998 letter of John F. Carroll, Esq. ("Carroll Letter"), at 2) When one considers that the only point being disputed in this petition is whether defense counsel at trial was ineffective for failing to preserve the *Rosario* issue, and that the only way to avoid that finding that was under discussion at the time I asked

counsel for submissions was the possibility that the memo book might contain only *310 the duplicative equivalent of *Rosario* material, respondent's insistence that the issue had not been preserved was unresponsive, and less than helpful to his own position. Respondent's only relevant answer to the question I posed was to quote from a segment of Pabon's report, and then to assert, although not to demonstrate, that "the complaint report is virtually identical to the memo book entry." (Carroll Letter at 2) Respondent also pointed out that the failure to argue the duplicate equivalency issue in the courts of New York, and the consequent failure of those courts to address the issue, does not bar this court from addressing it. See *Pinkney v. Keane*, 920 F.2d 1090, 1094 (2d Cir.1990), *cert. denied*, 501 U.S. 1217, 111 S.Ct. 2824, 115 L.Ed.2d 995 (1991). (*Id.* at 1 n. 1) There is no unfairness to petitioner in reaching that issue here. Respondent could not have been expected to argue in state court that the memo book was the duplicate equivalent of the police report if petitioner did not move for a new trial based on the failure to produce the memo book. It is the absence of such a motion that is the basis for petitioner's argument here, and that occasions an examination of the duplicate equivalency issue.

II.

Prior to *Rosario*, the trial courts in New York State determined which documents in the prosecution's possession were relevant to the defense and ordered production accordingly. *See People v. Machado*, 90 N.Y.2d 187, 191, 659 N.Y.S.2d 242, 244, 681 N.E.2d 409 (1997). Under the *Rosario* rule, later codified in a statute, the prosecutor must "make available to the defendant ... [a]ny written or recorded statement ... made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony." N.Y.Crim. Proc. Law § 240.45(1)(a). The rationale for the change in approach, as articulated in *Rosario*, was that as between a trial judge and defense counsel, "the latter is in a far

better position to appraise the value of a witness' pretrial statements for impeachment purposes," and therefore the defense should have access to all such statements before trial. *Rosario*, 9 N.Y.2d at 290, 213 N.Y.S.2d at 451, 173 N.E.2d 881.

That rationale was later extended still further by the Court of Appeals. Defense counsel's "far better position to appraise the value of a witness' pretrial statements for impeachment purposes" later came to mean that judges could have no say at all in that appraisal. In *Consolazio*, 40 N.Y.2d at 454, 387 N.Y.S.2d at 66, 354 N.E.2d 801, the Court of Appeals announced, although it did not apply, a rule that eschewed harmless error in direct review of convictions involving alleged *Rosario* violations. As later articulated by the Court of Appeals, the rationale for that per se rule was as follows:

The essence of the *Rosario* requirement, that the prosecutor supply all of a witness' statement or statements relating to his testimony, is that a judge's impartial determination as to what portions may be useful to the defense, is no substitute for the single-minded devotion of counsel for the accused. Appellate judges have no advantage over trial judges in making such a determination.

People v. Perez, 65 N.Y.2d 154, 160, 490 N.Y.S.2d 747, 750-51, 480 N.E.2d 361 (1985). In a later case, the Court pronounced it flatly "impossible" to engage in harmless error analysis of *Rosario* violations because to do so would involve "sheer speculation" on such subjects as "the questions counsel might have asked or avoided asking, how the witness might have answered, and how such differences in the testimony might have affected the decision of the jury." *Jones*, 70 N.Y.2d at 551 and 552 n. 4, 523 N.Y.S.2d at 56 and n. 4, 517 N.E.2d 865. "It is this inability of a reviewing court, to ascertain how defense counsel might have employed the withheld material, that distinguishes cases involving *Rosario* violations from cases

involving other errors where the application of harmless error analysis is appropriate." *Jones*, 70 N.Y.2d at 552, 523 N.Y.S.2d at 56, 517 N.E.2d 865.

Actually, this purported inability to determine how defense counsel might have employed withheld information is not unique to cases involving *Rosario* violations, yet the Court of Appeals has mandated harmless *311 error review in similar cases. *See People v. Steadman*, 82 N.Y.2d 1, 8-9, 603 N.Y.S.2d 382, 385, 623 N.E.2d 509 (1993) (requiring harmless error analysis in weighing claim of withheld impeachment material). Even further, this purported inability in *Rosario* cases is found to afflict trial and appellate judges only when a conviction is still on direct review, the New York State Legislature having failed to prescribe a standard of review when it codified the *Rosario* rule in N.Y.Crim. Proc. Law § 240.45(1)(a). However, when a conviction is collaterally attacked by motion, the statute requires a petitioner to show prejudice. N.Y.Crim. Proc. Law §440.10(1)(f) (McKinney 1993). Recognizing that it was not free simply to disregard that requirement, the Court of Appeals simply ratified two standards of review of alleged *Rosario* violations: one, a judge-made rule, bars judges engaged in direct review of a conviction from determining whether a withholding of *Rosario* material has resulted in prejudice to the defendant because, as stated in *Perez* and *Jones*, judges are unsuited to the task and therefore they can not, should not and will not do it; the second, a rule made by the legislature, requires judges to make that determination and therefore, although judges have pronounced themselves unsuited and unable to do it, they nonetheless do it. *See People v. Jackson*, 78 N.Y.2d 638, 647, 578 N.Y.S.2d 483, 489, 585 N.E.2d 795 (1991). Different standards of review before and after appeals had been exhausted conceivably could be rationalized based on society's lesser interest in the finality of convictions before such exhaustion, but harmless error review is applied to a motion under N.Y.Crim. Proc. Law

§ 440.10 even when that motion is made before the defendant's appeal has been concluded. *See Machado*, 90 N.Y.2d at 193, 659 N.Y.S.2d at 245, 681 N.E.2d 409.

The per se reversal rule has also been rationalized in part as a judicially created incentive to prosecutors to disclose *Rosario* material in timely fashion, see *Consolazio*, 40 N.Y.2d at 455, 387 N.Y.S.2d at 67, 354 N.E.2d 801 ("Reflection thus suggests that once it is determined that the writings sought by the defendant come within the *Rosario* rule, the better practice would be to direct a turnover forthwith."). It bears mention that not only did that incentive fail here, but there was also displayed an incentive of a different sort, once the memo book did emerge, to craft a former officer's testimony in order to make it appear that the memo book did not contain *Rosario* material, but rather contained a synopsis of events not attributable to any particular witness. (See p. 308, *supra*) Moreover, on another occasion, the Court of Appeals noted that in such cases, the diligence of the prosecutor or absence of it does not matter at all, any more than the significance of the material or lack of it; this observation was made even while presenting the rationale of *Rosario* as one arising from fairness. *Jones*, 70 N.Y.2d at 553, 523 N.Y.S.2d at 57, 517 N.E.2d 865 ("The focus of *Rosario* is on fairness to defendant--not on the conduct or motives of the prosecutor. If *Rosario* material is denied the defendant, he has been deprived of what he should have. It matters not that the denial may have been inadvertent or immaterial."). I have been unable to find the case that explains in what sense reversing a conviction for inadvertent failure to disclose immaterial information promotes "fairness to defendant."

The anomalies arising from the per se reversal rule, such as raising the consequences of nonconstitutional *Rosario* violations higher than those of constitutional violations, which may be subject to harmless error analysis, have been recognized even by members of the Court that created the rule, *see Jones*, 70

N.Y.2d at 553-57, 523 N.Y.S.2d at 57-60, 517 N.E.2d 865 (Bellacosa, J., concurring), but the force of the rule remains undiminished. *See Banch*, 80 N.Y.2d at 615, 593 N.Y.S.2d at 494, 608 N.E.2d 1069. Indeed, the rule has resulted in at least one reversal in federal court under § 2254 based on a theory identical to the one petitioner argues here: that counsel who failed to press a viable *Rosario* claim so as to seek automatic reversal of a conviction was, for that failure, ineffective under *Strickland. Mayo*, 13 F.3d at 537.

However, as noted, the New York Court of Appeals recognized in *Consolazio* an exception to the per se reversal rule for cases in which the *Rosario* material that is not disclosed *312 in timely fashion is the "duplicative equivalent" of *Rosario* material that is so disclosed. In *Consolazio*, a fraud case, the prosecutor turned over the grand jury testimony of complaining witnesses who testified at trial, but failed to turn over questionnaires filled out by an investigator who had spoken with the witnesses and wrote down their answers to questions about how they had come to meet the defendant and to invest money with him. *Consolazio*, 40 N.Y.2d at 452, 387 N.Y.S.2d at 65-66, 354 N.E.2d 801. The Court of Appeals found that the undisclosed questionnaires, referred to as "worksheets," were *Rosario* material as to the witnesses whose statements were recorded therein, 40 N.Y.2d at 453, 387 N.Y.S.2d at 65, 354 N.E.2d 801, but nonetheless concluded that reversal was not warranted:

Our examination of the Grand Jury testimony of the various prosecution witnesses (which testimony was turned over by the prosecutor to the defense) reveals that the witnesses' statements contained in the worksheets were the same as the statements made by such witnesses before the Grand Jury. The worksheets in this instance were nothing more than duplicative equivalents of statements previously turned over to the defense--the only difference being as to the particular form in which such state

ments were recorded. In this circumstance it was not error to fail to turn over worksheets which would have been cumulative only. 40 N.Y.2d at 454, 387 N.Y.S.2d at 66, 354 N.E.2d 801. Although it seems counter-intuitive that the statements on the questionnaires were literally "the same" as the grand jury testimony, and examination of the appendix to the brief submitted by *Consolazio* to the Court of Appeals tends to confirm what intuition suggests, *compare Consolazio* App.2018 (quoting grand jury testimony that was disclosed) with *Consolazio* App.2019-20 (quoting questionnaire responses of the same witness), the Court of Appeals nonetheless concluded that they were sufficiently similar not to warrant reversal.

In *Ranghelle*, however, an opinion that treated appeals in two cases, the Court of Appeals appears to have applied the duplicative equivalent exception more rigidly. In the first of the two cases before the Court, the only item of *Rosario* material was undisclosed. When compared with the witness' trial testimony, the undisclosed *Rosario* material "was consistent with [the witness' trial] testimony, [but] it lacked essential details to which she later testified at trial, omissions which might have constituted important material for cross-examination." *Ranghelle*, 69 N.Y.2d at 64, 511 N.Y.S.2d at 585, 503 N.E.2d 1011. The second case decided in the *Ranghelle* opinion is closer to the case at bar in that one item of *Rosario* material--a police report--had been turned over, while another--officers' memo books--had not. However, although both items of *Rosario* material apparently recorded the same statements of the complaining witness, it was not as to the complaining witness that the *Rosario* issue was raised, but rather as to the officers, who testified at trial. As to them, the memo book entries constituted statements at a different time from the statements recorded in their report. The Court ruled that when there were unspecified "inconsistencies" between the two records, albeit "minor," the memo books could not be considered "duplicative equivalents" of the police report within the meaning of *Consolazio* and reversal was warranted.

69 N.Y.2d at 65, 511 N.Y.S.2d at 586, 503 N.E.2d 1011. In its most recent ruling on the duplicative equivalent issue, the Court has emphasized the absolute necessity of comparing undisclosed and disclosed records, when more than one record is at issue. *See People v. Joseph*, 86 N.Y.2d 565, 569, 635 N.Y.S.2d 123, 125, 658 N.E.2d 996 (1995), where the Court held that if the undisclosed record is missing or destroyed, and no comparison is possible, no argument of equivalency can be accepted.

In *Jones*, as in the first of the two cases decided in *Ranghelle*, only undisclosed *Rosario* material was at issue. The concurrence argued, as the prosecution had in *Ranghelle*, that that undisclosed material was the "duplicative equivalent" of the witness' trial testimony. *Jones*, 70 N.Y.2d at 553-57, 523 N.Y.S.2d at 57-60, 517 N.E.2d 865 (Bellacosa, J., concurring). As in *Ranghelle*, the argument was rejected. The undisclosed material showed, as the witness' trial testimony *313 had not, that the witness had been arrested on a weapons charge, that he had been fired from his job, and that he had "actually sold 2 1/2 to 5 times more than the quantity of drugs which he claimed in his trial testimony to have sold." 70 N.Y.2d at 550, 523 N.Y.S.2d at 54-55, 517 N.E.2d 865.

Finally, in *Young*, a murder case, the undisclosed *Rosario* information included a description of potentially significant marks on the victim's body. The Court treated the discrepancies between statements as a bar to application of the "duplicative equivalent" rule, and used language that petitioner emphasizes, at least in part, in his submission here:

> Indeed, a statement that is consistent with other disclosed material but omits details or facts cannot be considered the "duplicative equivalent" of the disclosed material, since omissions often furnish important subjects for cross- examination.

Young, 79 N.Y.2d at 370, 582 N.Y.S.2d at 980, 591 N.E.2d 1163 (emphasis in Henry Letter at 2).

III.

[8][9] The key to deciding this case, in my view, lies in the unemphasized final clause of the sentence from *Young* quoted immediately above, which explains the need for a close comparison of disclosed to withheld statements as follows: "omissions often furnish important subjects for cross- examination." So they do, but only when the omissions at issue appear in statements by the witness at different times. If the omissions at issue appear merely in different records of the same statement by the witness, then any omissions in an undisclosed record cannot conceivably be the subject of cross-examination of the witness because those omissions arise merely from variations in what the recorder of the statement wrote in different places, not from variations in what the witness said on different occasions, the witness by hypothesis having spoken only once.

In this case, according to Pabon's testimony, we are dealing with two documents, the memo book and the police report, that record the same conversation with the witness. (Tr. 29-30) Any omissions in the memo book, which was not turned over, as compared with the police report, which was, could not have been the subject of cross-examination of the witness, the victim's mother, because she did not write either. Therefore, omissions in the memo book as compared to the police report, if such there be, are irrelevant. The only conceivably relevant inquiry is whether there is information in the memo book attributable to the mother that is not included in the police report, because such information would have been unavailable to counsel for cross-examination purposes.

That inquiry, as demonstrated by the chart on page 309 above, shows that the memo book, like the police report, reflects the

name of the victim; the crime committed against him; the name of the mother; and the name, address, approximate age and ethnicity of the perpetrator. The memo book says "victim notified mother"; the police report does not say that in so many words, but it reflects that the mother was the person who reported the crime and thus, obviously, that her child told her about it. The memo book states that the victim "was sodomized by neighbor while he went to play their [sic][8] with perps children." The police report states that the crime occurred when the victim was "playing at neighbors apt." and "while going to a neighbor's house to play." In this regard, the only information that appears in the memo book that does not appear explicitly in the police report is that the victim had gone to play at the perpetrator's apartment "with perps children." That fact, however, is utterly unremarkable; it simply completes the thought that the victim had gone to the perpetrator's apartment to play with those whom children most commonly play with when they visit the apartments of neighbors--the neighbors' children. The phrase, "with perps children" conveys nothing that is not implicit by common experience in the disclosure that the victim had gone to the neighbor's house to play. Certainly, that phrase cannot convey any inconsistency in prior statements by the mother, who is the only witness at issue, because, again, we are *314 dealing with two items of *Rosario* material that record a single statement on a single occasion, not two statements on separate occasions. Moreover, although *Ranghelle* and its progeny foreclose any inquiry into the usefulness of *Rosario* material, I note that there has been no claim that the phrase was inconsistent with the witness' trial testimony, or otherwise could have provided the basis for any inquiry on cross-examination.

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[8] This is an obvious misspelling of "there", meaning at the neighbor's apartment.

No New York case cited by counsel, or that I have been able to locate, deals with a situation where, as here, one statement was recorded in two different places, and the failure to turn over one of those records necessitated a new trial because of a finding that such failure constituted a *Rosario* violation with respect to the witness who made the statement.[9] Accordingly, consistent with controlling New York authority and, in particular, with the exception to the per se reversal rule recognized in *Consolazio* and its progeny, I find that in this case the undisclosed memo book was the duplicative equivalent of the disclosed police report. Therefore, there is no basis for finding that a new trial would have been granted here, even if *Flores*' trial counsel had moved for one. Nor is there any basis, therefore, to find that *Flores* suffered prejudice from his lawyer's concession that the memo book entries would have been useless in cross-examining the victim's mother. See *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

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[9] I have found only one case involving such a failure to turn over a statement recorded in two different places where that argument was even made, *see People v. Gaskins*, 171 A.D.2d 272, 575 N.Y.S.2d 564 (2nd Dep't 1991), and that case was decided on statutory grounds and not based on whether the undisclosed statement was or was not the duplicative equivalent of the disclosed statement. *Gaskins* involved a child victim of sexual abuse whose testimony was videotaped for presentation to the grand jury pursuant to N.Y.Crim. Proc. Law § 190.32 (McKinney 1993). The transcript was turned over to defense counsel but the tape itself was not. However, N.Y.Crim. Proc. Law § 240.45, the statutory embodiment of the *Rosario* rule, requires that both the videotaped testimony and the transcript be disclosed, and on that statutory basis the appellate court directed a new trial. Although *Flores* suggests that *People v. Gallman*, 240 A.D.2d 512, 657 N.Y.S.2d 781 (2d Dep't 1997) involved the same statement recorded in two different places, that decision, a summary memorandum, does not so state, but does report the prosecutor's concession that a duplicative equivalent analysis could not be made. Id., 657 N.Y.S.2d at 782. There is no such concession here.

For the above reasons, the writ is denied and the petition is dismissed.

SO ORDERED.

Appendix C - Report and Recommendation of United States Magistrate Judge James C. Francis IV

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 2891 (MBM)

RAFAEL FLORES,

Petitioner,

- against -

JOSEPH DEMSKIE, Acting Superintendent, Woodbourne Correctional Facility,

Respondent.

REPORT AND RECOMMENDATION

TO THE HONORABLE MICHAEL B. MUKASEY, U.S.D.J.:

Rafael Flores brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his sodomy conviction in New York State Supreme Court, Bronx County. He contends that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. For the reasons that follow, I recommend that Mr. Flores' application be denied and the petition be dismissed.

Background

On October 16, 1990, Mr. Flores was convicted of four counts of first degree sodomy in violation of New York Penal Law § 130.50. The evidence presented at trial included

testimony from the victim and his mother. (Tr. 32-81; 101-38).[10] On November 9, 1990, the petitioner was sentenced to four concurrent terms of imprisonment of five to fifteen years. Robert Katz served as counsel to <2> Mr. Flores during these proceedings.

During the jury selection process, Mr. Katz became aware that the prosecution had failed to provide him with the memo book of a police officer who had interviewed the victim and his mother while escorting them to the hospital. (Tr. 238). The statements contained in the memo book described the circumstances of the crime and the actions taken by the victim's mother. Under New York's so-called "Rosario rule," the prosecutor has an obligation, prior to trial, to "make available to the defendant . . . [a]ny written or recorded statement . . . made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony." N.Y. Crim. Pro. L. § 240.45(1)(a), codifying People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S. 448 (1961). A prosecutor's complete failure to turn over Rosario material at trial is per se reversible error. People v. Banch, 80 N.Y.2d 610, 615, 593 N.Y.S.2d 491, 494 (1992).

Before Mr. Katz proceeded with his case, it was apparent that he would not obtain the memo book from the prosecutor without judicial intervention. He therefore relayed his concerns to the court:

> I just want to put on the record that I have been in communication with the [Assistant District Attorney] before the trial began [sic] of the memo books of the officer who responded to the hospital, who interviewed the child and/or the

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[10] "Tr." refers to the trial transcript.

> mother, and I understand that <3> those books are, as of this morning, still unavailable.

(Tr. 164-65).

After receiving the prosecutor's explanation for the delay, the court concluded that the failure to provide Mr. Katz with the memo book was "absolutely inexcusable." (Tr. 166). The court went on to clarify for counsel the likely effect of a Rosario violation:

> You know what the [New York] Court of Appeals has said with respect to these memo books . . . . Here we are at the end of trial. Case has been pending almost two years, and you stand there and tell me you have never given them the memo books, that's outrageous, I tell you the truth. I have never seen anything as shabby as that. It's not your fault, it's your office's fault. The Bronx District Attorney's Office doesn't know what it's doing. The Court of Appeals has made it clear that we have to give these memo books over to the defense and here we are, the last day, thinking of charging the jury in a case that clearly must be reversed if you don't turn over the memo books.

(Tr. 166-67).

The court determined that it would allow Mr. Katz to present his evidence and then adjourn the case until the prosecutor obtained the memo book and provided it to Mr. Katz. Mr. Katz finished his case and gave his summation.

The following day, the prosecutor informed Mr. Katz and the court that he could not obtain the memo book from the

police officer and did not know how to proceed. (Tr. 237-38). When the court asked to hear from Mr. Katz on this issue, he responded by stating, "I really don't know <4> what choice we have at this point just for the record." (Tr. 238). The court decided to charge the jury, and ordered that the "Court will have [Mr. Katz] preserve his exceptions for the record with respect to that memo book." (Tr. 238). The court then discussed Mr. Katz's options:

> When and if the memo book becomes available, it will be turned over to counsel and if counsel feels that it's appropriate, he will make whatever motions he deems necessary on behalf of his client even to the extent of setting aside the verdict if need be.

(Tr. 238).

After the verdict but before sentencing, the prosecutor provided Mr. Katz with the memo book. At Mr. Flores' sentencing, Mr. Katz told the court that he had reviewed it and concluded that "there is absolutely nothing in the memo book that would have made any difference in terms of what I did or did not do, ask or did not ask and that's about it." (S. 2).[11] The court inquired as to whether Mr. Katz wished to make a motion with respect to the verdict. (S. 2). Mr. Katz moved to set aside the verdict only as against the weight of the evidence.

Following appointment of appellate counsel, Mr. Flores filed a motion for an order to vacate his conviction pursuant to

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[11] "S." refers to the transcript of the sentencing proceedings.

§ 440.10 of the New York Criminal <5> Procedure Law.[12] Mr. Flores argued that he had received ineffective assistance of counsel both because Mr. Katz had failed to move to set aside the verdict on the basis of the alleged Rosario violation and because hd made comments concerning the memo book at sentencing that were prejudicial to his client's interest. The petitioner also sought relief on the basis of the Rosario claim itself. On December 4, 1992, the New York Supreme Court denied this motion without a hearing. Petition for a Writ of Habeas Corpus ("Pet."), Exh. G. On February 4, 1993, the Appellate Division, First Department, denied Mr. Flores' application for leave to appeal the Supreme Court's order. Pet., Exh. I.

On direct appeal, Mr. Flores pursued the same claims. The Appellate Division unanimously affirmed the trial court's judgment. People v. Flores, 194 A.D.2d 439, 599 N.Y.S.2d 255 (1st Dep't 1993). The New York Court of Appeals affirmed this order on July 7, 1994. People v. Flores, 84 N.Y.2d 184, 615 N.Y.S.2d 662 (1994).

In the instant habeas corpus petition, Mr. Flores argues that Mr. Katz's failure to move to vacate the verdict based on a per se reversible error constitutes ineffective assistance of counsel in violation of the Sixth Amendment. In response, the prosecution argues <6> that: (1) Mr. Flores' petition is time-barred; (2) the Rosario claim was not properly preserved; (3) the memo book was not Rosario material; and (4) Mr. Katz's performance was not ineffective.

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[12] Mr. Flores sought this type of collateral review because it was not clear whether the purported Rosario material – the memo book – was part of the record in the trial court.

Discussion

A. Statute of Limitations

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), which establishes a one-year statute of limitations for habeas corpus applications. 28 U.S.C. § 2244(d)(1). The prosecution argues that the one-year limitations period runs from the date on which the state court judgment of conviction becomes final, in this case July 7, 1994. Respondent's Memorandum of Law ("Respondent's Memo") at 14. Because Mr. Flores filed the instant petition on April 19, 1996, almost two years later, the prosecution claims that the petition is not timely and must be dismissed. Respondent's Memo at 14. However, the Second Circuit has held that § 2244(d)(1) does not apply retroactively to petitions filed before the effective date of the AEDPA – April 24, 1996. Reyes v. Keane, 90 F.3d 676, 679 (2d Cir. 1996). Since Mr. Flores filed his application before the effective date, the AEDPA's statute of limitations is inapplicable. Therefore, Mr. Flores' petition is not time-barred.

<7> B. Preservation of Rosario Claim

The respondent asserts that Mr. Katz did not properly preserve for appeal the potential Rosario claim. Given that the petitioner's ineffective assistance claim is based on Mr. Katz's failure to make a posttrial motion with respect to the Rosario issue, his alleged failure to properly preserve that issue for appeal during the course of trial must be considered part of the same constitutional claim. Therefore, this failure cannot impede federal habeas corpus review of Mr. Flores' Sixth Amendment claim.

C. The Memo Book as Rosario Material

As discussed above, Rosario material is "[a]ny written or

recorded statement . . . made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness' testimony." N.Y. Crim. Pro. L. § 240.45(1)(a) (McKinney 1993). It is apparent that the likely source of the written statements contained in the memo book was either the victim or his mother. Since both of these individuals testified at trial, in all probability the memo book falls within the definition of Rosario material. However, in light of the analysis below, this issue need not ultimately be determined.

<8> D. Ineffective Assistance of Counsel

1. Mr. Katz's Rose as Counsel

Mr. Flores contends that he was denied effective assistance of counsel in violation of his sixth Amendment rights when Mr. Katz arbitrarily discarded the opportunity to overturn the verdict. Because the relevant constitutional analysis varies according to whether the claim is brought with respect to the performance of trial or appellate counsel, the Court must first determine in what capacity Mr. Katz was acting when he rendered the allegedly deficient performance. As will be discussed below, this determination is critical to selecting the proper standard for analyzing whether the criminal defendant has been prejudiced by counsel's conduct.

Since the petitioner's claim arises out of Mr. Katz's failure to make a posttrial motion setting aside the verdict on Rosario grounds, it can be argued that this omission constituted ineffective assistance of appellate counsel. Had the Rosario issue first come to light after the trial was completed, this argument would have merit. However, it is clear that Mr. Katz was fully aware of the missing memo book during trial, indeed as early as jury selection. As the trial progressed, Mr. Katz raised the issue with the court, prompting the court to remind the prosecutor, on the record, about <9> the necessity of providing the memo book

and the likelihood of a reversal if that task was not accomplished. After the prosecutor still had failed to produce the memo book, the court reiterated that any conviction would be reversible on Rosario grounds. Accordingly, before the jury was even charged, the court specifically instructed Mr. Katz that he could move for whatever relief he deemed appropriate. Certainly, then, Mr. Katz's failure to move for a reversal on Rosario grounds cannot be considered an isolated posttrial error, but rather a decision based on issues raised and debated by counsel and the court throughout trial. When so viewed, Mr. Katz's conduct is properly analyzed under the constitutional standards applicable to trial counsel.

2. Ineffective Assistance of Trial Counsel

In order to sustain a claim of ineffective assistance of trial counsel, the defendant must demonstrate that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. See Strickland v. Washington, 466 U.S. 668, 687 (1984); see also Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). In assessing an attorney's performance, a reviewing court must determine whether his conduct "fell below an objective standard of reasonableness" given the facts and circumstances of the particular case. Strickland, 466 U.S. at 688. Generally, the actions of <10> counsel are presumed to be reasonable. See DeLuca v. Lord, 77 F.3d 578, 584, 588 (2d Cir. 1996), cert. denied, __ U.S. __, 117 S. Ct. 83 (1996) ("Judicial scrutiny of counsel's performance must be highly deferential . . . [reviewing courts] must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.") (citation omitted). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

a. Deficient Performance

In this case, there can be no question that at the time Mr. Katz served as Mr. Flores' defense attorney in October 1990, the Rosario rule was firmly established in New York law. In 1986, the New York Court of Appeals held that the prosecution's complete failure to deliver Rosario material "constitutes per se error requiring that the conviction be reversed and a new trial ordered." People v. Ranghelle, 69 N.Y.2d 56, 63, 511 N.Y.S.2d 580, 585 (1986) (citation omitted). Two years later, the Court of Appeals reaffirmed this standard in People v. Martinez, 71 N.Y.2d 937, 940, 528 N.Y.S.2d 813, 815 (1988), concluding that "[r]eversal is required in . . . <11> cases [involving delay of production] if the defense is substantially prejudiced by the delay," while the state's complete failure to provide the material to the defendant "constitutes per se reversible error requiring a new trial." It is therefore reasonable to assume that by 1990 members of the New York defense bar knew about and fully understood the Rosario rule.

Despite these unambiguous pronouncements by the State's highest court, Mr. Katz did not move to reverse Mr. Flores' conviction based on the prosecutor's failure at trial to produce Rosario material. Rather, he chose only to make a motion to set aside the verdict as against the weight of the evidence. Not surprisingly, the court immediately determined that "the verdict was well-supported by the evidence in this case" and denied Mr. Katz's motion. (S. 3). Mr. Katz's failure to raise the Rosario violation is all the more inexplicable in light of the court's criticism of the prosecutor's conduct and its pointed comments to counsel that this violation would likely require a reversal of the conviction upon motion by Mr. Katz. Nevertheless, he opted instead to raise a claim with no discernible chance of success. Under these circumstances, it is difficult to characterize Mr. Katz's performance as competent.

This conclusion is amply supported by the affirmation that Mr. Katz submitted with the petitioner's <12> § 440.10 motion, in which he averred that "he was not aware that the failure to turn over the memo book, unless waived, was per se reversible error that would have required vacatur of Mr. Flores' conviction." See Affirmation of Robert Katz dated July 1, 1992 ¶ 7, attached as Exh. L to the Petition. Rather, his belief was that "to prevail on a Rosario claim, I would have to show prejudice." Id. These statements demonstrate that Mr. Katz's decision to forego the Rosario claim cannot be considered either a reasonable professional judgment or a reasoned strategic choice, but rather a complete misunderstanding of prevailing law.[13]

Mr. Katz's comment at sentencing that the memo book would not have altered his trial presentation also reflects his mistaken belief that the Rosario claim was not a viable issue. The prosecution contends, however, that once Mr. Katz made his determination about the memo book, Mr. Flores no longer had a "substantive right to be violated," since the Rosario rule contemplates that the material at issue have some value to the defense. Memo at 28-29. Yet the ineffective assistance claim does not <13> hinge upon Mr. Katz's posttrial assessment of the memo book's utility; instead, the relevant inquiry is whether Mr. Katz made this assessment without understanding the contours of the Rosario rule. Because that was the case, Mr. Katz's failure to argue the Rosario violation was objectively unreasonable.

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[13] The prosecution's assertion that Mr. Katz could have waived the Rosario claim for strategic reasons, such as currying favor with the trial judge for sentencing or sparing Mr. Flores the strain of a second trial, is wholly unconvincing. Because the petitioner denied any wrongdoing and because the trial judge had already indicated that a Rosario violation would result in a new trial, Mr. Katz's actions cannot be labeled "strategic."

b. Prejudice

The critical factor in evaluating the prejudice component of the Strickland test is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Fretwell, 506 U.S. at 372 (citation omitted); accord Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."). In contrast, "[t]o establish prejudice in the appellate context, a petitioner must demonstrate that there was a reasonable probability that [his] claim would have been successful before the [state's highest court]." Mayo v. Henderson, 13 F.3d 528, 534 (2d Cir. 1994) (citation and quotation omitted).

The petitioner claims that the "outcome determination" standard enunciated in Mayo applies to this case, since "there is no meaningful basis to <14> distinguish between an attorney who scuttles a winning Rosario issue on appeal and one who does so at trial." Reply Memorandum in Support of Petition for Writ of Habeas Corpus at 22. This contention ignores the basic difference between the roles of trial and appellate counsel – the former must protect "the fundamental right to a fair trial," Strickland, 466 U.S. at 684, and "the fairness of the adversary proceeding," United States v. Cronic, 466 U.S. 648, 656 (1984), while the latter must "examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Because the type of prejudice visited upon a defendant by his attorney's incompetence varies according to whether the conduct occurred at trial or on appeal, the prejudice analysis must also vary. To that end, the Fretwell Court held that in the context of claims of ineffective assistance of trial counsel, "[a prejudice] analysis focusing solely on mere outcome determination, without attention to whether the result

of the proceeding was fundamentally unfair or unreliable, is defective." Fretwell, 506 U.S. at 369. Thus, no basis exists in this case for ignoring the distinction between trial and appellate counsel.

Under the standard applicable to trial counsel, it cannot be said that Mr. Flores was prejudiced by his attorney's deficient performance. While Mr. Katz's <15> failure to make a Rosario claim may have deprived Mr. Flores of the opportunity for a new trial, it did not render the result of the trial he did receive unreliable or unfair. The entire entry in the memo book reads as follows:

> 1140-Sexual Assault P.S. 211-
> 1155-1 female & 1 juvenile to
> Jacobi Hosp-
> 1210. At Jacobi Hosp-
> Examination done by
> Dr. Cohen. Sex Crimes Notified
> Castellano - Det. Gannon is Catching -61# 1145
> Aided #417 Boro log #317
> Sex Crimes Case #111
> Victim Miguel [S.]
> was sodomize by neighbor
> while he went to play their [sic]
> with perps children
> Victim notified mother
> who in turn notified
> Guidance counselor Hilda
> Beyares. Mother - Carmen
> [S.] DOB / /
> present at school and at
> Hospital
> 1445 En Rt to 48 to Sex Crimes
> Unit Det. Gannon----
> Perp Rafael [F]lores 1997 Huges

Ave Apt 12 approx 32 M/H.

There is no suggestion that having this information at trial would have assisted Mr. Katz in cross-examining the witnesses or benefitted the defense in any other way. Thus, the considerations of fairness and reliability underlying the decision in Fretwell are not implicated by Mr. Katz's deficient performance. Accordingly, Mr. Flores cannot sustain a claim for ineffective assistance of counsel.
<16>
Conclusion

For the reasons set forth above, I recommend that Mr. Flores' application for a writ of habeas corpus be denied and his petition be dismissed. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(e) of the Federal rules of Civil Procedure, the parties shall have ten (10) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Michael B. Mukasey, Room 2240, and to the chambers of the undersigned, Room 1960, at 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

_____

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE
JUDGE

Dated: New York, New York
May 13, 1997

Copies mailed this date to:

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<17>
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Appendix D - *People v. Flores*
84 N.Y.2d 184, 639 N.E.2d 19,
615 N.Y.S.2d 662 (1994)

The People of the State of New York, Respondent,
v.
Rafael Flores, Appellant.

MAJORITY
Bellacosa, J.

Defendant was convicted after a jury trial of four counts of sodomy in the first degree (Penal Law 130.50 [1], [2]), charges arising out of his deviate sexual intercourse with a six-year-old boy who lived in defendant's apartment building. The judgment was affirmed by the Appellate Division, and a Judge of this Court granted leave to appeal. The sole dispositive issue before this Court is whether defendant was deprived of effective assistance of counsel at the trial level.

At the close of the People's evidence, defense counsel, without requesting any relief or a mistrial, notified the court that his request for all possible *Rosario* material had not been satisfied. He had decided to proceed during the trial, without objection as to any *Rosario* concerns, to full cross-examination of the People's witnesses (*see, People v Rosario*, 9 NY2d 286, *rearg denied* 9 NY2d 908, *cert denied* 368 US 866).

After the jury returned its guilty verdict but before sentencing, a police officer's memo book possibly containing statements made by the complainant and his mother, both of whom testified at trial, was delivered to defense counsel. Defendant's lawyer reviewed the single page to see if it was potentially relevant and declared that it would have been of no evidentiary use or value. Specifically, defense counsel stated on the record that "there is absolutely nothing in the memo book that would have made any difference in terms of what I did or did not do, ask or did not ask and that's about it." There was no acknowledgement that it even technically qualified as *Rosario* material.

Defendant now argues that he was deprived of effective assistance of counsel (*see*, US Const 6th, 14th Amends; NY Const, art I, 6), concentrating essentially on a claim that his trial

attorney's evaluation and representation was per se "meaningless" because counsel gave away an allegedly sure-fire new trial, *Rosario* reversal.

The intellectually disciplined dispositional path of this case must not veer from this Court's long-standing, well-settled ineffective assistance of counsel analysis and authorities. In *People v Baldi* (54 NY2d 137), this Court held that when reviewing a claim of ineffective assistance of counsel, care should be taken "to avoid both confusing true ineffectiveness [of counsel] with mere losing tactics and *according undue significance to retrospective analysis*" (*id.*, at 146 [emphasis <Pg. 187> added]). The constitutional requirement of effective assistance of counsel will be satisfied when "the evidence, the law, and the circumstances of a particular case, viewed in *totality and as of the time of the representation*, reveal that the attorney provided meaningful representation" (*id.*, at 147 [emphasis added]; *see also, People v Satterfield*, 66 NY2d 796, 798-800). This protection does not guarantee a perfect trial, but assures the defendant a fair trial (*see, People v Claudio*, 83 NY2d 76, 80, citing *United States v Cronic*, 466 US 648, 658). To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice (*see, People v Benn*, 68 NY2d 941, 942).

This defendant received a fair trial and was not denied his constitutional right to effective assistance of counsel. The totality of representation examined as of the time of representation, not retrospectively second-guessed four years later, supports this elementary conclusion. Moreover, the attorney's decision not to press for a new trial at the postverdict stage of the criminal proceeding--assuming without having to decide in this case that a new trial was then procedurally and merit-wise available--based on a possible *Rosario* appellate point of argument, is another aspect of the attorney's role at the trial level which fits distinctively within the very heart of the *Rosario*

rule. Judge Fuld articulated that rule as a "right sense of justice" requiring defense counsels' personal examination to "determine for themselves" whether a document may be helpful for cross-examination purposes (*People v Rosario*, 9 NY2d 286, 289, *supra* [emphasis added]; *see, People v Ranghelle*, 69 NY2d 56, 62). The Court emphasized this shift in focus and responsibility from the courts to defense attorneys preeminently because the nuances, features and scope of cross-examination "are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused" (*People v Rosario, supra*, at 290). Defense counsel in this case got eventually to do precisely what *Rosario* directed. Neither the preverdict conduct of defense counsel nor his on-the-record evaluation and explanation prior to sentencing rise to the level of "egregious and prejudicial" conduct, especially since there can be no certainty at this juncture that a new trial was an available remedy at those stages of the trial proceedings, measured by the totality-of-meaningful-representation standard <Pg. 188> necessary to prevail on an ineffective assistance of counsel claim.

For all this record reveals about defense counsel's ultimate evaluation of the disclosed item, on the scene and in the circumstances at that postverdict stage of the criminal proceeding, defense counsel could have reasonably considered that his client's interest would best be served by no further delay in the resolution of the case against the client. Any number of other professional strategic reasons or personal considerations affecting the defendant's fair trial interests could also have informed the attorney's professional evaluation and choice on how and why to proceed in the way chosen. The record does emphatically inform us, even as an appellate court reviewing the matter, of the defense lawyer's assessment of the quality and nature of the ultimately disclosed item--"absolutely" useless. A plausible strategy might even have included advocacy for amelioration of sentence or some other nuanced advantage in the adversarial exchanges and context, all matters and features not

knowable by trial or appellate Judges removed from the full range of choices and context exercised singularly by the trial lawyer for the defendant. In sum, *Rosario* was designed to insure that defense counsel, not Judges, should do the strategic viewing, weighing and exercising of the defendant's fair trial advocacy interests in this regard (*see, People v Rosario*, 9 NY2d 286, 290, *supra*).

Even less persuasively, the rationale of the dissent proposes to establish a new New York analytic framework that an "unexplained error" by counsel is sufficient, by itself, to deprive defendant of effective assistance (dissenting opn, at 192). This Court has steadfastly and wisely adhered to an analytical approach and rule requiring all the evidence to be weighed in context and as of the time of complete representation at the trial level for resolving ineffective assistance of counsel claims (*see, People v Baldi*, 54 NY2d 137, 147, *supra; see also, People v Rivera*, 71 NY2d 705, 708, citing *People v Droz*, 39 NY2d 457). A substantial, single "blunder" could, of course, qualify, but that is not this case and that ought not be the newest per se orthodoxy. The dissent's reliance on *Murray v Carrier* (477 US 478) does not change our analysis. In *Murray* (*supra*, at 496), the Supreme Court stated that an isolated error of counsel can constitute ineffective assistance of counsel but only "if that error is sufficiently egregious and prejudicial," i.e., that error was so serious that defendant did not <Pg. 189> receive a "fair trial" (*see, People v Claudio*, 83 NY2d 76, 80, *supra*, citing *United States v Cronic*, 466 US 648, 655, *supra*).

In that context, this record further demonstrates that defense counsel represented his client diligently and vigorously during the course of the entire trial. Counsel exhaustively cross-examined the People's witnesses and delivered opening and closing statements that were consistent with defendant's defense (*see, e.g., People v Hood*, 62 NY2d 863, 865). Further, counsel was successful in having several counts of an extremely serious multiple count indictment dismissed. Indeed, the record shows that counsel exercised a single-minded devotion to his client's

best interests and representation. Thus, when viewed in its totality as of the time of trial, the attorney's professional services at trial did not deprive this defendant of "meaningful representation" (*People v Baldi*, 54 NY2d 137, 146-147, *supra*). Facile hindsight or mere difference of view or approach with an exercise of professional judgment by defense counsel do not translate automatically into ineffective assistance of counsel qualifying as the denial of a fair trial. In the end, defendant has simply failed to satisfy the well-settled, high burden of showing that he was deprived of a fair trial and meaningful representation sufficient to warrant a reversal. We agree with the Appellate Division's unanimous observation that:

> "When counsel candidly denies having any use for the material when it is finally disclosed, it cannot be said that the defendant has any substantive right to be vindicated, and there is no basis in law or logic to order a new trial when there is no new issue to be tried. There is no basis in the record to controvert counsel's conclusions, and neither can counsel's representation be deemed incompetent merely because he did not pursue a concededly frivolous substantive claim as a basis for a new trial" (194 AD2d 439).

Therefore, we, too, conclude that no justification has been advanced justifying a new trial, to pursue anew a line of inquiry defense counsel evaluated and declared "absolutely" meaningless and valueless (*see, People v Claudio*, 83 NY2d 76, 80, *supra*).

Accordingly, the order of the Appellate Division should be affirmed.

DISSENTING
Titone, J.

(Dissenting). I cast my vote to reverse and order a <Pg. 190> new trial, thereby affording defendant the benefit he would have had if his attorney had not inexplicably waived the per se *Rosario* remedy to which he was clearly entitled under this Court's precedents (*see, e.g., People v Jones*, 70 NY2d 547).[14]

The majority's decision to reject defendant's present argument that he was denied the effective assistance of counsel rests on its assertion that counsel might have had some strategic reason for failing to seek the new trial to which his client was unquestionably entitled. However, given the advancement of the client's penal interests as the appropriate yardstick, it is difficult to discern a valid "strategic" advantage that this defendant, who had already been convicted of four counts of first degree sodomy, would have enjoyed by forgoing the new trial that would surely have followed from a properly made CPL 330.30 motion to set aside the verdict. Moreover, even if a theoretical "strategic" benefit for waiving defendant's rights at the

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[14] The majority hints at some change in the law, noting that there is some question in its mind as to whether a new trial "was ... procedurally and merit-wise available" (majority opn, at 187). Since there is no doubt that the failure to disclose *Rosario* material is per se reversible error when the disclosure occurs after the close of evidence (*see, People v Jackson*, 78 NY2d 638, 649; *People v Jones*, 70 NY2d 547; *cf., People v Ranghelle*, 69 NY2d 56), I can only assume that the majority's reservation concerns the question whether a motion to set aside a verdict under CPL 330.30 (1) is a proper vehicle for asserting a *Rosario* claim discovered after announcement of verdict. I would note, however, that any conclusion by this Court that CPL 330.30 (1) is not available in these circumstances would represent a dramatic change in the law (*see, e.g., People v Kanefsky*, 50 NY2d 162; *People v Wright*, 197 AD2d 398; *see also, People v Jackson, supra*, at 658 [Titone, J., dissenting]). Thus, the possibility that some of the members of this Court might, in the future, arrive at such a conclusion has no bearing on whether defense counsel here acted competently "as of the time of ... representation at the trial level" (majority opn, at 188).

postverdict, prejudgment stage could be articulated, there could be no conceivable "strategic" reason for a defense attorney to volunteer for the record his own opinion that the prosecution's Rosario violation had not led to any palpable prejudice. In opting to speak out rather than simply refraining from moving to set aside the verdict under CPL 330.30, defendant's trial counsel affirmatively foreclosed the possibility of obtaining relief at some future point (*see, People v Jackson*, 78 NY2d 638, *supra*). Whatever justification may have existed in counsel's mind for waiving an indisputably meritorious Rosario claim at that point in the proceedings, no similar justification could exist for counsel's entirely separate choice to make observations that could only redound <Pg. 191> to his client's detriment (*see, People v Bell*, 48 NY2d 933; *cf., People v Baldi*, 54 NY2d 137).

The majority speculates about the existence of "[a]ny number of ... professional strategic reasons or personal considerations affecting defendant's fair trial interests" (majority opn, at 188). The Court refers to "advocacy for amelioration of sentence" as a "plausible strategy," (majority opn, at 188) but does not explain how forgoing a legitimate motion to set aside the verdict for *Rosario* error could possibly advance that goal. The only other specific "strategic" consideration that is offered is that counsel "could have reasonably considered that his client's interest would best be served by no further delay in the resolution of the case" (majority opn, at 188). In other words, the Court is now prepared to accept as "reasonable" representation, a decision by defense counsel to handle the case in such a way as to assure his or her client swift and certain punishment. Manifestly, if that rationale can be invoked to explain an otherwise inexplicable act by defense counsel, there would be little professional misconduct left that could ever be considered "ineffective assistance."

Although we may have gone a long way in the direction of tolerating apparent professional blunders in the name of "trial strategy," even that doctrine must have some limits. And, those limits, to the extent they exist, must be measured by reference to our basic assumptions about an attorney's role in an adversary

system. These assumptions include the fundamental supposition that a criminal defense attorney will do whatever is necessary and appropriate--within the law's confines--to help the client to avoid an unfavorable adjudication or to escape punishment (*see*, Code of Professional Responsibility, Canon 7, DR 7-101; EC 7-1). While there may be anomalous individual situations in which a client prefers prompt punishment for some personal reason, those situations are rare and atypical. They certainly cannot be used as a fair basis for presuming that a particular attorney's wholly self-defeating acts were the product of a deliberate strategic choice.

If the rule requiring the "effective assistance" of counsel at trial is to have any meaning at all, it must be premised on the notion that, in most cases, the attorney's aim is to defeat the People's charges or at least to minimize the client's exposure to incarceration. Any action--or inaction--that could conceivably advance those goals can arguably be deemed "trial strategy." <Pg. 192> Delivering up one's client for incarceration sooner rather than later--with no concrete advantage discernible--obviously does not fall within that category.

Significantly, even the Appellate Division did not attempt to invoke the "trial strategy" analysis the majority has used in order to rationalize its decision to affirm. Instead, the Appellate Division relied on its own sense that defendant should not be afforded a new trial when, according to his counsel's "candid" statement, defendant had no "substantive right to be vindicated" (194 AD2d 439). Manifestly, that rationale is equally infirm, since it overlooks that, in view of the prosecution's belated *Rosario* disclosure, defendant had a substantive right to a new trial without regard to any hindsight estimate of what value the undisclosed material might have had (*see, People v Jones, supra*).

In truth, there is no legally or logically cognizable basis in this case for concluding that defendant received the effective assistance of counsel to which he was entitled. While defense counsel may have otherwise conducted an unobjectionable

defense, counsel's unexplained error in waiving defendant's winning *Rosario* claim and thereby depriving him of a second chance at acquittal was so egregious and unquestionably prejudicial as to constitute a denial of effective assistance in itself. Although an ineffective-assistance-of-counsel claim must be "weighed in context and as of the time of complete representation at the trial level" as the majority notes (majority opn, at 188), that does not--and, in fact, cannot--mean that a single error by counsel can never alone form the basis of a valid ineffective-assistance claim (*see, Murray v Carrier*, 477 US 478, 496 [even an isolated error can constitute ineffective assistance]).[15]

Here, defendant had nothing to lose and everything to gain by objecting to the prosecution's *Rosario* violation and demanding <Pg. 193> a new trial without regard to the actual prejudice that that violation had caused. Counsel's failure to obtain that benefit for his client cannot be reconciled with his duty to provide informed and zealous representation. Accordingly, I dissent from the majority's decision to affirm the judgment of conviction.

Chief Judge Kaye and Judges Simons, Smith and Levine concur with Judge Bellacosa; Judge Titone dissents and votes to reverse in a separate opinion in which Judge Ciparick concurs.

Order affirmed.

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[15] The majority notes that defense counsel sought no particular relief during trial based upon the undisclosed *Rosario* material. Inasmuch as this appeal concerns the effectiveness of trial counsel's performance at trial, it is difficult to discern what legal significance can logically be ascribed to counsel's purported silence. In any event, for the sake of clarity, it must be noted that there were extensive discussions about the undisclosed *Rosario* material during trial. Further, the trial court itself made it clear that, in its view, a continued failure by the prosecutor to comply would lead to a reversal of any jury determination. The trial court's comments on the subject, including its statement that it would "have [defense counsel] preserve his exceptions for the record with respect to th[e] memo book," made further action by defense counsel unnecessary.

Appendix E - *People v. Flores*
194 A.D.2d 439, 599 N.Y.S.2d 255
(1st Dept. 1993)

The People of the State of New York, Respondent,
v.
Rafael Flores, Appellant.
Supreme Court, Appellate Division, First Department,
New York
(June 17, 1993)

Judgment, Supreme Court, Bronx County (Lawrence Tonetti, J.) rendered November 9, 1990, convicting defendant after a jury trial of four counts of sodomy in the first degree, and sentencing him to concurrent terms of 5 to 15 years, unanimously affirmed.

At the close of the People's case, defense counsel first alerted the court that certain purported *Rosario* material had not yet been disclosed, but did not then move for a mistrial or request any other sanction. After the verdict but before sentencing, the document was disclosed to counsel, who represented at sentencing that he had reviewed the document and found it to be of no evidentiary value for the defense. On appeal, defendant argues that this concession, coupled with counsel's failure to move to vacate the verdict, demonstrates ineffective assistance of trial counsel. We disagree.

Implicit in the rule that a guilty verdict is to be vacated in the event of non-disclosure of *Rosario* material is a requirement that the material might have been of some value to the defense, although the defendant is under no burden to show how (*cf.*, *People v Jones*, 70 NY2d 547, 552, n 4). When counsel candidly denies having any use for the material when it is finally disclosed, it cannot be said that the defendant has any substantive right to be vindicated, and there is no basis in law or logic to order a new trial when there is no new issue to be tried. There is no basis in the record to controvert counsel's conclusions, and neither can counsel's representation be deemed incompetent merely because he did not pursue a concededly frivolous substantive claim as a basis for a new trial.

Concur--Sullivan, J. P., Ellerin, Kupferman, Ross and Asch, JJ.